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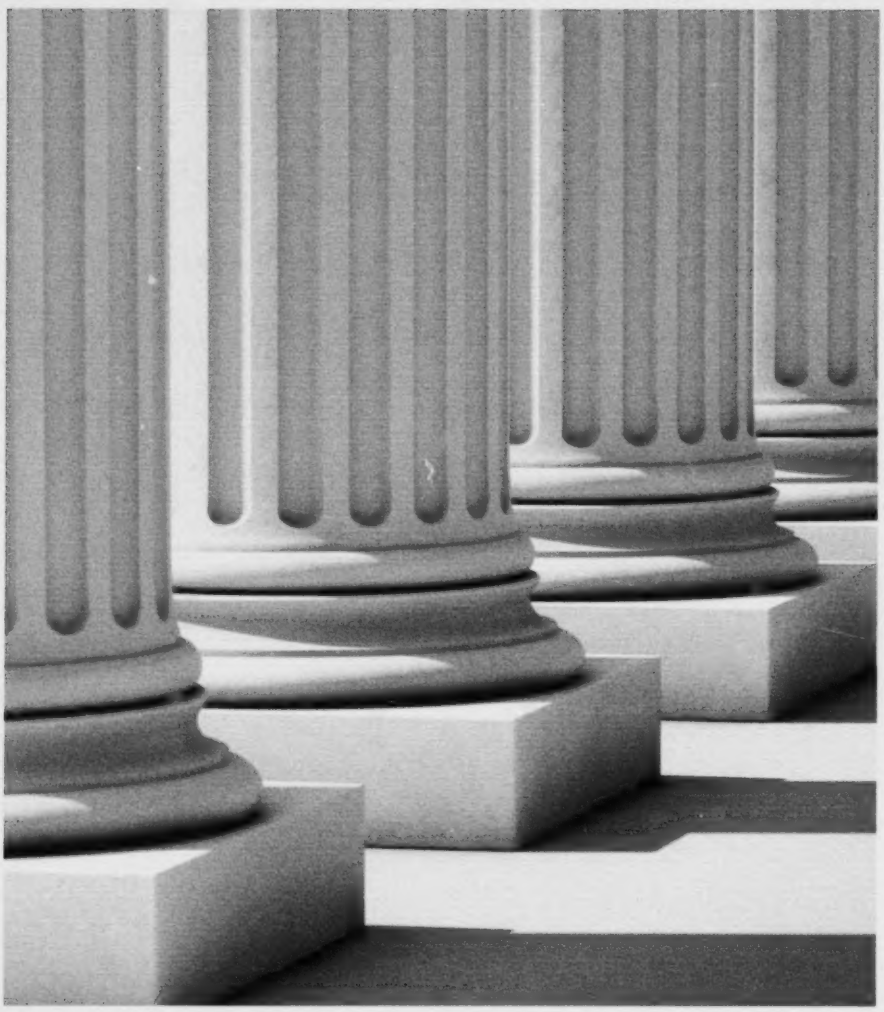
PERPETUITIES LAW: ABOLISH OR REFORM?



REPORT FOR DISCUSSION

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) re-examines the law of perpetuities in Alberta. Should it be abolished? If not, should the *Perpetuities Act* be further reformed? The Report discusses legal developments in other jurisdictions, outlines potential reform models and solicits readers' input about how Alberta should best proceed in this area of the law today.

We welcome any comments you may have in support of or in opposition to any of the ideas discussed in this Report. We also welcome any additional options for reform which you may wish to propose.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider the issues and to express their views. All comments received will be considered when ALRI makes final recommendations.

You can reach us with your comments or with questions about this document on our website, mail or e-mail to:

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Acknowledgments

This report is designed to inform readers of the issues in this area, explore arguments for and against various potential reform options, encourage discussion about appropriate legal policies and solicit readers' input about solutions.

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Summary

The common law rule against perpetuities

The rule against perpetuities (RAP) was developed by English courts in the 17th century as a way to prevent landowners from using future and contingent interests to tie up property for generation after generation. RAP seeks to control the creation of future, contingent interests in property which may vest outside of the specified perpetuity period. The perpetuity period is measured with reference to any life or lives in being that are in existence at the creation of the interest, plus 21 years. If, at the date that the disposition takes effect, it is not certain that the contingent interest will vest within the perpetuity period, then the interest will be considered void at the outset. RAP was received law from England and became part of the law of Alberta.

Over the centuries the courts expanded RAP with the result that it now applies to virtually all future or contingent interests in property, regardless of whether the interest is real, personal, legal or equitable. RAP and its expansion have resulted in a complex and virtually incomprehensible body of law that is often misapplied and misunderstood.

Statutory reform: the wait and see principle

In 1971, the Alberta Law Reform Institute (ALRI), then the Institute of Law Research and Reform, recommended legislation that would reform and simplify the common law RAP. Though ALRI specifically rejected abolition of RAP, it suggested that the province adopt the wait and see principle. Under this approach, it is possible to wait for the perpetuity period to expire in order to determine if the disposition does, in fact, vest during the specified period. If vesting does occur, then the disposition will be valid. If vesting does not occur, then the disposition will be invalidated, but only once the perpetuity period expires. ALRI also recommended certain other reforms, most of which were intended to mitigate the harsh consequences of the common law rule. ALRI's recommendations were implemented by the *Perpetuities Act*, which is still in force in Alberta today.

Perpetuities landscape in Canada

Since Alberta last examined perpetuities law, RAP has been abolished in Manitoba, Saskatchewan, and Nova Scotia. The Uniform Law Conference of Canada has recently recommended that all other provinces should likewise abolish RAP.

Should perpetuities law be abolished?

Does perpetuities law serve any valid legal or social purpose in today's society? It seems to be well accepted that the historical purpose of preventing wealthy landowners from creating successive family estates is not relevant in Canada. However, many view the modern purpose of perpetuities law as creating a balance between past and present, so that a settlor or testator may dictate the disposition of his or her property, but may not control it so far into the future that the beneficiaries cannot appropriately respond to changed times and circumstances. Similarly, restricting how far into the future a settlor or testator can control his or her property may benefit society by ensuring that property is used to meet contemporary needs, rather than outdated ones.

Are certain modern legal mechanisms sufficient substitutes for perpetuities law?

Modern tax law now includes the 21-year deemed disposition rule, which states that the majority of trusts are deemed to dispose of and reacquire all trust property at fair market value every 21 years. The practical result of this rule is that, every 21 years, the trust is faced with a large tax exposure but may have little to no liquidity with which to pay the bill. To avoid these tax consequences, trust interests will not usually remain unvested for longer than 21 years.

However, the deemed disposition rule does not apply to certain trusts, or to certain property held within a trust. Further, while the tax consequences may reduce the incentive to create a long-lasting trust with unvested interests, it does not actually prohibit a settlor from doing so.

The second modern legal mechanism that may act as a replacement for perpetuities law is court variation of trusts legislation. Such statutes may provide that a trust can be varied or terminated if all the beneficiaries of the trust are of full capacity and in agreement, or if the court provides substitute consent for dissenting beneficiaries or beneficiaries who are otherwise incapable of providing consent. Is variation of trusts legislation now the true source of balance between the competing interests of the settlor or testator and their present and future beneficiaries? On the other hand, should there be concern about substituting judicial discretion to vary or terminate a trust for the complex, but certain, consequences of RAP? Further, trust variation requires a court application, which raises access to justice issues.

If retained, should perpetuities law be reformed?

Choosing to retain perpetuities law does not necessarily mean that the *Perpetuities Act* should continue to govern in its current form. Three potential reform models are presented and discussed:

- Perpetuities law should allow a choice between RAP's perpetuity period calculated by reference to lives in being and a fixed perpetuity period for vesting, but should retain the wait and see principle.

- RAP should be codified, the concept of lives in being should be eliminated, a fixed perpetuity period for vesting should be implemented, and the wait and see principle should be retained.

- RAP, lives in being, vesting and the wait and see principle should be completely replaced with a legislated, fixed duration period for trusts.

How should non-trust equitable and common law interests be handled if perpetuities law is abolished?

If variation of trusts legislation is a suitable replacement for RAP, it still has at least one shortcoming. It does not apply to the non-trust equitable and common law interests that are otherwise subject to perpetuities law (for example, commercial options). If perpetuities law is abolished, how should perpetuities issues relative to these types of interests be handled? The report discusses several options:

- Statutorily provide that variation of trusts legislation applies to non-trust equitable and common law interests.

- Enact a separate variation statute for non-trust equitable and common law interests.

- Enact a statutory duration limit for non-trust equitable and common law interests.

- Do not make non-trust equitable and common law interests subject to any variation statute or duration limit.

- With respect to common law property interests **only**, statutorily abolish common law or legal successive interests and convert them to equitable interests taking effect behind a trust so that variation of trusts legislation will be applicable to them.

How should non-trust and commercial interests be handled if perpetuities law is retained?

Should perpetuities law continue to apply to commercial or non-trust interests? Other law reform agencies have pointed out that, with respect to commercial interests, the application of RAP is an unnecessary and unwarranted interference in the parties' freedom to contract. On the other hand, if perpetuities law is reformed so that the perpetuity period is

generously long, it may not be a hardship for commercial interests to comply. Further, it may be simpler to apply perpetuities law to all interests uniformly, rather than attempting to describe which interests are exempt. Is there any valid social or legal policy that justifies the continued application of perpetuities law to commercial or non-trust interests?

Issues

ISSUE 1

What valid social or legal purpose, if any, does perpetuities law serve in today's society? (please indicate all that apply)

(a) Perpetuities law does not serve a valid social or legal purpose in today's society.

(b) Perpetuities law benefits beneficiaries by balancing their need to use the property in changed times and circumstances with the settlor's or testator's desire to control disposition of property far into the future.

(c) Perpetuities law benefits society by ensuring that property will be used to meet contemporary needs, not outdated ones.

(d) Other (please specify)..... 18

ISSUE 2

One modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our income tax system's 21-year deemed disposition rule. Is this tax rule a viable and adequate control of the situation? 25

ISSUE 3

Another modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our court variation of trusts legislation, as bolstered by the ULCC reforms. Is this variation power a viable and adequate control of the situation for dispositions created by trust? 28

ISSUE 4

Taking all factors into consideration, such as any modern purpose of perpetuities law together with the potential control of perpetuities issues in trusts by income tax law and the power of courts to vary trusts, should perpetuities law be abolished or retained in Alberta?..... 29

ISSUE 5

Should the perpetuity period of the *Perpetuities Act* be redefined and simplified?

(a) No, retain the perpetuity period found in the Act.

(b) Yes, the perpetuity period should be redefined and simplified..... 33

ISSUE 6

If the *Perpetuities Act* should be reformed by redefining and simplifying the perpetuity period, what would be the best way to do so?

(a) Allow the person who grants the interest to choose between using the rule against perpetuities' perpetuity period calculated by reference to lives in being or an alternate vesting period specified in the instrument which does not exceed a fixed period, while retaining the wait and see principle.

(b) Completely codify the rule against perpetuities, eliminate lives in being and legislate a fixed vesting period, while retaining the wait and see principle.

(c) Completely replace the *rule against perpetuities, lives in being,* vesting and the wait and see principle and legislate a fixed duration period for trusts instead.
(d) Other (please specify)..... 42

ISSUE 7
What should be the maximum time period for the operation of a redefined and simplified perpetuity period in Alberta?
(a) 40 years.
(b) 80 years.
(c) 125 years.
(d) 150 years.
(e) Other (please specify)..... 43

ISSUE 8
Given that current court variation of trusts legislation does not apply to **common law or legal** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?
(a) Statutorily provide that variation of trusts legislation applies to them.
(b) Statutorily abolish common law or legal property interests and convert them to equitable interests taking effect behind a trust so that variation of trusts legislation will apply to them.
(c) Enact a separate variation statute for them.
(d) Enact a statutory duration limit for them.
(e) Do not make them subject to any variation statute or duration limit.
(f) Other (please specify)..... 51

ISSUE 9
Given that current court variation of trusts legislation does not apply to **non-trust equitable** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?
(a) Statutorily provide that variation of trusts legislation applies to them.
(b) Enact a separate variation statute for them.
(c) Enact a statutory duration limit for them.
(d) Do not make them subject to any variation statute or duration limit.
(e) Other (please specify)..... 52

ISSUE 10
Is there any valid social or legal policy purpose to apply perpetuities law to commercial or non-trust interests?
(a) No.
(b) Yes (please specify)..... 55

ISSUE 11
How should transitional issues be handled? 62

Table of Abbreviations

TERMINOLOGY

RAP	Rule Against Perpetuities
DDR	Deemed Disposition Rule

LEGISLATION

Alberta Act	*Perpetuities Act*, RSA 2000, c P-5.
England Act	*Perpetuities and Accumulations Act 2009* (UK) 2009, c 18.

LAW REFORM PUBLICATIONS

Alberta Report	Institute of Law Research and Reform (Alberta), *Report on the Rule Against Perpetuities*, Report 6 (1971).
England Report	Law Commission (England), *The Rules Against Perpetuities and Excessive Accumulations*, Report 251 (1998).
Manitoba Report	Manitoba Law Reform Commission, *The Rules Against Accumulations and Perpetuities*, Report 49 (1982).
Nova Scotia Report	Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (2010).
New Zealand Issues Paper	Law Commission (New Zealand), *Perpetuities and the Revocation and Variation of Trusts*, Issues Paper 22 (2011).
New Zealand Report	Law Commission (New Zealand), *Review of the Law of Trusts: A Trust Act for New Zealand*, Report 130 (2013).
Saskatchewan Report	Law Reform Commission of Saskatchewan, *Proposals Relating to the Rules Against Perpetuities and Accumulations*, Final Report (1987).

CHAPTER 1

Introduction

A. Perpetuities Law in Alberta

[1] English courts created the common law rule against perpetuities (RAP) in the 17th century to control and limit how settlors and testators were using future and contingent estates to postpone vesting of the fee simple estate in land for an unreasonably long and indefinite period.[1] The courts honed and expanded RAP in the following centuries and applied it broadly to both real and personal property, creating in the process an extremely complex and arcane body of law. As in the rest of Canada, this law was received and became part of the law of Alberta.

[2] With the passage of the *Perpetuities Act* in 1972, Alberta extensively reformed the common law of RAP.[2] This reform was based on recommendations from the Institute of Law Research and Reform, now the Alberta Law Reform Institute (ALRI).[3] The new Act was in line with reform carried out elsewhere in Canada and the Commonwealth. Since then, however, three Canadian provinces have completely abolished RAP and no longer have any perpetuities law. The Uniform Law Conference of Canada (ULCC) has recently recommended that all Canadian jurisdictions should follow suit.

[3] In this report, ALRI re-examines RAP, the Alberta Act and perpetuities law in general, discusses the legal policies present in various jurisdictions, outlines potential reform models and solicits readers' input about how Alberta should best proceed in this area of the law today. Is reform needed and, if so, what form should it take?

B. How This Project Arose

[4] ALRI's project to examine the continued viability of perpetuities law in Alberta arose from two sources. First of all, ALRI prepared and recently published preliminary recommendations in another project concerning

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[1] *Duke of Norfolk's Case* (1682), 22 ER 931 (Ch).

[2] *Perpetuities Act*, RSA 2000, c P-5 [Alberta Act].

[3] Institute of Law Research and Reform (Alberta), *Report on the Rule Against Perpetuities*, Report 6 (1971), online: <www.alri.ualberta.ca/docs/fr006.pdf> [Alberta Report].

implementation of the ULCC's new *Uniform Trustee Act*.[4] The ULCC recommended the abolition of RAP as part of the overall legislative scheme in this area.

[5] Coincidentally but independently, a letter was also received during that same period from the then Minister of Justice requesting that ALRI consider reviewing the continued need for RAP.[5] The Alberta Act had recently been amended to exempt mineral leases[6] and qualifying environmental trusts[7] from its application, following concerns about RAP's effect on these areas. The former Minister of Justice was therefore concerned that RAP "may be causing some difficulties in this province's dynamic economic environment" and so inquired whether ALRI would examine the "potential abolishment or modification of the rule."[8]

C. Framework of the Project

[6] ALRI seeks to consult with stakeholders in this area, including the legal profession, the judiciary and those involved in relevant areas of business and property transactions. Input will be sought both through direct responses to this Report for Discussion and through an electronic survey based on it.

[7] After consideration of the consultation results, ALRI will issue a Final Report containing its recommendations.

D. Outline of the Report

[8] Following Chapter 1's general introduction, Chapter 2 summarizes current perpetuities law in Canada and Alberta. Chapter 3 sets out the arguments for and against abolition of perpetuities law in general and RAP in particular. If a decision is made to retain perpetuities law rather than to abolish it, Chapter 4 explores whether the current Alberta Act would benefit from reform and, if so, what changes might be warranted. Chapter 5 discusses special issues

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[4] Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Report for Discussion 28 (2015), online: <www. alri.ualberta.ca/docs/rfd028.pdf>.

[5] Letter from Jonathan Denis QC, Minister of Justice, to Peter Lown QC, ALRI Director (22 August 2014).

[6] *Statutes Amendment Act, 2013*, SA 2013, c 10, s 3, amending s 19 of the Alberta Act.

[7] *Justice Statutes Amendment Act, 2014*, SA 2014, c 13, s 9, adding s 22.1 to the Alberta Act.

[8] Letter from Jonathan Denis QC, Minister of Justice, to Peter Lown QC, ALRI Director (22 August 2014).

involving non-trust equitable, common law and commercial interests. The report concludes with a consideration of various transitional issues in Chapter 6.

CHAPTER 2

Perpetuities Law in Canada and Alberta

A. Introduction

[9] This chapter examines the general law of perpetuities as it currently exists in Canada and Alberta. As mentioned in Chapter 1, RAP was created and refined by the courts of England starting in the 17th century and came to Canada as received law. Our courts and legislatures have further shaped this law in the Canadian context.

B. Perpetuities Law in Canada and Alberta

1. THE UNREFORMED RULE

[10] The essential purpose of RAP is to "strike a balance between the interests of property owners seeking to control the future disposition of their land and that of future property owners to control and alienate the land."[9] In other words, RAP regulates how long the law will allow someone to tie up property through the creation of any contingent interest. The common law allows it only for the limited time of the perpetuity period so that a person may basically control assets in the hands of their children and grandchildren, but no further.[10]

[11] RAP applies to virtually all future or contingent interests in property, regardless of whether the interest is real, personal, legal or equitable.

[12] At common law, RAP has two formulations which serve the same purpose in different settings. The first formulation is the rule against remoteness of vesting. The second is the rule against indefinite duration or perpetual trusts.[11]

a. Rule against remoteness of vesting

[13] The rule against remoteness of vesting "invalidates an interest which may possibly vest beyond a period of a life or lives in being at the creation of the

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[9] Halsbury's Laws of Canada, *Real Property* (Markham, Ont: LexisNexis Canada, 2012) at HRP-33 "The rule against perpetuities" [Halsbury's RP].

[10] AH Oosterhoff et al, eds, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed (Toronto: Carswell, 2009) at 580 [Oosterhoff].

[11] Oosterhoff, note 10 at 313.

interest plus 21 years."[12] A person qualifies as a life in being if they are alive or conceived in the womb at the time of the creation of the interest.[13]

[14] Validity or invalidity is judged when the devise or transfer of property takes effect, i.e., the effective date of an *inter vivos* transfer or the date of a testator's death. If there is any possibility, however unlikely, that a future interest may not vest in time, the devise or transfer will fail and be void *ab initio*.[14] RAP's focus on mere possibility, not probability, has created its own system of illogical logic. In striking down property arrangements for violation of RAP, case law formulated the "doctrine of possibilities." Creatively named examples of the doctrine defy all laws of science and common sense, such as the fertile octogenarian, the precocious toddler, the unborn widow and the magic gravel pit.[15] As noted by Canada's leading expert, Donovan Waters, QC:[16]

> The reason for this approach, however, is not perversity. The courts took the view that it must be certain when a disposition takes effect, whether the interests created by the disposition are valid or invalid.... Initial certainty is much prized in some quarters as an attribute of the unreformed rule. Indeed, an attribute it is, but the price paid is the incredible, if logical, doctrine of possibilities which has had two results. First, it has meant that interests have been declared invalid on the grounds of possibilities, and in so many instances as it happened the contingency subsequently occurred within the perpetuity period. The policy of the rule, to prevent vesting in interest outside the perpetuity period, is thus perverted; many more contingent interests are invalidated than the policy requires. Secondly, the doctrine of possibilities, because it permits such extraordinary assumptions as to what may happen, has made the perpetuity rule a series of traps for the unwary draftsman.

b. Rule against indefinite duration or perpetual trusts

[15] The rule against indefinite duration or perpetual trusts is framed in terms of duration, not vesting, and is designed to deal with purpose trusts. This aspect of RAP:[17]

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[12] Oosterhoff, note 10 at 313.

[13] Oosterhoff, note 10 at 580.

[14] Halsbury's RP, note 9 at HRP-33.

[15] For a full explanation of these doctrines, see Halsbury's RP, note 9 at HRP-33.

[16] Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 376-377 [footnote omitted] [Waters on Trusts].

[17] Halsbury's Laws of Canada, *Trusts* (Markham, Ont: LexisNexis Canada, 2011) at HTR-92 "Rule against infinite duration."

> ... renders a trust void, even though it creates an interest which takes effect immediately, if it lasts or may last beyond the perpetuity period. Because there is rarely a relevant life in being, the perpetuity period is 21 years.

[16] This rule has a very narrow and specific application. It applies ***only*** to non-charitable purpose trusts, such as a trust to maintain a testator's grave or a beloved pet. It does not apply to charitable trusts, which are allowed to endure forever because of their beneficial social value.[18] It also has no application to trusts with real beneficiaries and lives in being.

c. Status of RAP in Canada

[17] In Canada, the unreformed common law RAP currently applies to dispositions in Newfoundland and Labrador and in New Brunswick. Recently, while preparing a new *Trustee Act* based on the ULCC's uniform work, New Brunswick decided against abolishing RAP and chose to retain it unchanged.[19] Prince Edward Island also retains the basic unreformed rule but has legislated a longer perpetuity period of a life in being plus 60 years.[20] Apart from these three jurisdictions, most Canadian jurisdictions have either fundamentally reformed RAP or abolished it.

[18] RAP does not, of course, apply to the civil law jurisdiction of Quebec. However, the Civil Code of Quebec has its own system of limiting the duration of trust and trust-like property dispositions based on ranks of beneficiaries (typically limited to spouse, children and grandchildren in succession) and/or by a set number of years. For example, a gratuitously-created personal trust to benefit one or more persons can designate only two successive ranks of income beneficiaries in addition to the capital beneficiary. No individual interest can remain contingent for more than 100 years, and the total duration of the trust cannot exceed 200 years.[21]

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[18] Halsbury's Laws of Canada, *Trusts* (Markham, Ont: LexisNexis Canada, 2011) at HTR-92 "Exceptions."

[19] See *Trustee Act*, SNB 2015, c 21 [in force June 1, 2016]. There is no published Report concerning this decision.

[20] *Perpetuities Act*, RSPEI 1988, c P-3, s 1.

[21] Arts 1271-1272 CCQ. For a detailed discussion of the law in Quebec, see Waters on Trusts, note 16 at 1409-1444.

2. THE REFORMED RULE

[19] Many jurisdictions in the Commonwealth and United States have reformed the common law RAP by substituting a "wait and see" principle for the doctrine of possibilities. Initial certainty of vesting is foregone for greater fairness by invalidating only those dispositions which are proven, in time, to actually breach RAP. The traps for the unwary have been eliminated – for example, actual childbearing capacity is now able to be assessed rather than superhuman fertility being assumed.[22]

[20] When it comes to measuring the wait and see perpetuity period, most reform jurisdictions retain the concept of lives in being plus 21 years but many attempt to identify, clarify and limit which lives are to be used in calculating that period. As stated in the Alberta Report, the statutory list of lives in being:[23]

> ... is at the heart of the Act. It does not do away with the lives that may be used at common law to determine whether a disposition is valid. It is still necessary to apply the common law rule to determine whether "wait and see" need be invoked. Once "wait and see" applies then the statutory list of lives is used. As Professor Maudsley has said, "wait and see" saves dispositions which fail to comply with the certainty rule rather than abolishing the certainty rule as such.

[21] In addition to the wait and see approach, reform legislation typically enacts "a series of saving techniques, each of which alters the offending provisions of the instrument in a particular way, and is designed by changing the disposition to bring those provisions within perpetuity period vesting."[24] All these reform measures are aimed at curbing the worst excesses of the rule against remoteness of vesting.

[22] As for the rule against perpetual trusts and the non-charitable purpose trusts to which it applies, reform legislation provides that such a trust's "specific purpose" is to be construed, not as a trust of property, but as a power to appoint property instead. This immediately solves perpetuity problems and also increases the kinds of non-charitable purposes to which property may be directed.[25]

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[22] Waters on Trusts, note 16 at 377.

[23] Alberta Report at 20-21.

[24] Waters on Trusts, note 16 at 378.

[25] Waters on Trusts, note 16 at 377-378.

[23] In Canada, six jurisdictions have reformed RAP in this way – Alberta, Ontario, British Columbia, Northwest Territories, Nunavut and Yukon.[26] All continue to use RAP's concept of a life or lives in being plus 21 years as the basic perpetuity period (subject to a statutory list of lives, when needed), although this measure is occasionally replaced by a fixed perpetuity period in selected circumstances.

[24] For example, British Columbia enacted a general option allowing the choice of a perpetuity period of up to 80 years, if desired.[27] Some jurisdictions legislate different perpetuity periods for specific kinds of interests or transactions. By way of example, Ontario specifies a 40 year perpetuity period for easements, *profits a prendre* or other similar interests.[28] For commercial transactions only, Alberta sets an 80 year perpetuity period.[29] Where there is a possibility of reverter, resulting trust or right of re-entry on breach of condition subsequent or an equivalent right in personal property, Alberta has legislated a perpetuity period of 40 years.[30]

[25] The reformed rule will be discussed below in greater detail when Alberta's current law is outlined.

3. THE ABOLISHED RULE

[26] Three Canadian jurisdictions have now abolished RAP completely – Manitoba, Saskatchewan and Nova Scotia.[31] Accordingly, their legal landscape has no perpetuities law or perpetuity period whatsoever, either at common law or in legislation. These provinces regard the historical social and economic conditions underlying RAP as being largely obsolete today. To the extent that any control may still be required, they are content to rely on modern taxation law and variation of trusts law to handle the situation.[32] Citing the example of these

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[26] Alberta Act; *Perpetuities Act*, RSO 1990, c P.9; *Perpetuity Act*, RSBC 1996, c 358; *Perpetuities Act*, RSNWT 1988, c P-3; *Perpetuities Act*, RSNWT 1988, c P-3, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Perpetuities Act*, RSY 2002, c 168.

[27] *Perpetuity Act*, RSBC 1996, c 358, s 7.

[28] *Perpetuities Act*, RSO 1990, c P.9, s 14.

[29] Alberta Act, s 18.

[30] Alberta Act, s 19(2).

[31] *The Perpetuities and Accumulations Act*, CCSM, c P33, s 3; *The Trustee Act, 2009*, SS 2009, c T-23.01, s 58; *Perpetuities Act*, SNS 2011, c 42, s 3.

[32] These were the main rationales enunciated in provincial law reform reports recommending such abolition: Manitoba Law Reform Commission, *The Rules Against Accumulations and Perpetuities*, Report 49 (1982) [Manitoba Report] and Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (2010) [Nova Scotia Report].

provinces, the ULCC recommended in 2012 that RAP be abolished right across Canada because:[33]

> ... the social and economic conditions of landed society that gave rise to the rules no longer obtain. It is no longer a significant concern that a settlor would seek to control trans-generational dispositions in perpetuity. It is more likely to be the case that a bequest might fail due to inadvertence as a result of the application of the rules. A potential instance, however unlikely, of someone endeavouring to exercise such perpetual control is better addressed by means of modern legislative provisions respecting variation of trusts, rather than by reliance on the application of a complicated rule and technical body of case law.

C. Current Alberta Law and ALRI's Past Involvement

[27] As already noted, Alberta extensively reformed the common law of RAP with passage of the Alberta Act in 1972, based on recommendations from the Institute of Law Research and Reform (now ALRI). The Institute rejected abolishing RAP and saw instead ongoing value in its basic policy purposes, so long as major reforms eliminated RAP's excesses and traps for the unwary.[34]

[28] On the Institute's recommendation, Alberta left the common law RAP in place to determine initial validity of a disposition. When attempting to save an invalid disposition using the wait and see principle, the Alberta Act measures the perpetuity period as a life or lives in being (defined by a statutory list) plus 21 years. Alberta does not offer the choice provided to disposition-makers in England, British Columbia and various Australian jurisdictions of specifying a different perpetuity period up to a maximum period of 80 years.[35]

[29] The central statutory reform enacted by the Alberta Act is the adoption of the wait and see principle in substitution for the common law doctrine of possibilities.[36] This reform saves many dispositions which do in fact vest within the perpetuity period, but which would have failed under the old common law

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[33] Uniform Law Conference of Canada, *Uniform Trustee Act: Final Report of the Working Group*, Proceedings of the Ninety-fourth Annual Meeting (2012) at para 34, online: <www.ulcc.ca/en/component/jifile/?filename=images/stories/2012_pdfs_eng/2012ulcc0028.pdf>.

[34] Alberta Report at 2-3.

[35] Alberta Report at 12-13. As previously noted, however, Alberta does set a fixed 80 year perpetuity period for commercial transactions.

[36] Alberta Act, ss 3-5.

doctrine of possibilities.[37] As Waters notes, the wait and see principle means that:[38]

> ... initial certainty of the validity or invalidity of an interest is lost, but a great many interests are thus saved by awaiting actual events rather than guessing at what could happen in the future. Few present day trusts do in fact create interests which would vest in interest beyond the perpetuity period if actual events are allowed to establish this fact.

[30] Additional statutory reforms aimed at saving dispositions include:

- rebuttable presumptions that males and females under a certain age and females over a certain age are not capable of having children.[39]
- *cy-pres* reduction of age contingencies so that the disposition will vest within the perpetuity period.[40] Essentially, this allows a court to vary the terms of the disposition instrument.
- general *cy-pres* authority for a court to vary whatever terms of the disposition threaten the timely vesting of interests, provided that the court can ascertain the creator's "general intention originally governing the disposition."[41]
- class-splitting rules, so that an entire class gift will no longer fail if one class member's interest fails to vest in time.[42]
- a deeming provision that a trust for a specific non-charitable purpose that is not illegal or contrary to public policy shall be treated as a power to appoint income or capital and will be valid so long as it is performed within 21 years of its creation.[43] This greatly expands the types of non-charitable purposes which can now be funded using trust dispositions. The common law recognized only a very few types, such as short-term trusts for pet or cemetery maintenance.

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[37] Halsbury's Laws of Canada, *Wills and Estates*, 2012 Reissue (Markham, Ont: LexisNexis Canada, 2012) at HWE-210 "No mere possibilities."

[38] Waters on Trusts, note 16 at 377.

[39] Alberta Act, s 9.

[40] Alberta Act, s 6.

[41] Alberta Act, s 8.

[42] Alberta Act, s 7.

[43] Alberta Act, s 20.

[31] The Alberta Act also clarifies that perpetuities law does not apply to employee pension plans or any other kind of benefit plans.[44] In addition, the Act repeals the *Accumulations Act, 1800*, an old English statute received into Alberta law which forbade accumulations of income beyond a very short specified period.[45] This repeal means that Alberta now relies on the perpetuity period of the reformed RAP to control that situation instead.[46]

[32] Finally, it should be noted that any instrument which took effect before July 1, 1973, the date on which the Alberta Act came into force, continues to be exclusively governed by the unreformed common law RAP.[47]

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[44] Alberta Act, s 22.

[45] *Accumulations Act, 1800* (UK), 39 & 40 Geo III, c 98.

[46] Alberta Act, s 24.

[47] Alberta Act, s 25.

CHAPTER 3

Should Perpetuities Law be Abolished or Retained in Alberta?

A. Introduction

[33] The first question for consideration is whether Alberta should abolish perpetuities law. Should Alberta follow the recommendation of the ULCC and the examples of Manitoba, Saskatchewan and Nova Scotia in this regard?

[34] What does abolition mean in the context of our law? Section 2 of the Alberta Act continues the common law RAP, which is then extensively modified by that statute. Since the Alberta Act does not itself create or codify RAP, ending this law in Alberta would actually involve a two-step process of statutorily abolishing RAP as it exists at common law and then repealing the Alberta Act which would be spent or meaningless at that point.

[35] This chapter examines the arguments for and against abolition. Forty-five years ago, Alberta and ALRI concluded that the unreformed common law RAP is uncertain, arbitrary, overbroad and unnecessarily complex. For those precise reasons, RAP's worst excesses were extensively reformed by the Alberta Act. Therefore, all the arguments justifying that initial reform will not be repeated here because they have already been accepted and acted on. At this stage, the central issue for determination is whether any social or legal policy justifications remain for keeping the reformed RAP or, indeed, any perpetuities law at all.

[36] What does retention mean in the context of our law? A decision to retain perpetuities law in Alberta does not mean that the Alberta Act should automatically continue to govern this area without reform or change. If some form of perpetuity period or limitation is still needed as a matter of social or legal policy, the issue then becomes whether RAP as modified by the Alberta Act is still the most effective way to do so. Are there other options about the precise form which restraint of perpetuities should take?

[37] The discussion in this chapter largely relates to the area of estates and trusts, especially the parts concerning alternate legal mechanisms which might now perform RAP's job and support its abolition. Chapter 5 explores RAP's application to the area of non-trust equitable, common law and commercial interests. It discusses in detail how to handle any gap in the effectiveness of trust-

based alternate legal mechanisms should perpetuities law be abolished. Even if perpetuities law is retained, Chapter 5 further examines whether it should have any continued role in the area of non-trust or commercial interests.

B. Are the Policies and Purposes Underlying Perpetuities Law Obsolete?

1. HISTORICAL PURPOSE

[38] When RAP arose in late 17th century England, the central foundation of that society's wealth was real property, the ownership and control of which was concentrated in a minority class of aristocrats and landed gentry. By the device of family settlements using successive contingent interests, this class sought to keep its land within the family for generation after generation, protecting its wealth from outsiders, spendthrift heirs and creditors. Limitations on the heirs' interest and postponement of vesting were designed to protect the land from encumbrances or alienation for perpetuity, if possible.[48] This desire to control property long after death was usually referred to as control by "the dead hand." To offset such schemes, the courts created RAP "to strike a balance between the aristocracy's ambitions for its descendants and the commercial reality of a market economy in which land ought to be traded like any other commodity."[49] The battle of wits over perpetuities that went on between drafters of family settlements, parliament and the courts lasted in England until the late 1800s, when legislation finally allowed courts to grant a power of sale to life tenants, bringing an effective end to the days of strict settlements.[50]

[39] Canadian reform agencies leading the repeal movement have been uniformly dismissive of the relevance of English social history to our country, either historically or today. As the Law Reform Commission of Nova Scotia wrote:[51]

> The problem of family settlements is virtually unknown in Nova Scotia, fees in tail have been abolished, and the common law prohibits conditions which restrict the free alienation of property interests.

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[48] Law Reform Commission of Saskatchewan, *Proposals Relating to the Rules Against Perpetuities and Accumulations*, Final Report (1987) at 1 [Saskatchewan Report].

[49] Saskatchewan Report at 2.

[50] Manitoba Report at 26.

[51] Nova Scotia Report at 12.

Manitoba also "avoided all this history."[52] The Law Reform Commission of Saskatchewan stated bluntly that:[53]

> The social conditions which gave rise to the rule against perpetuities no longer exist. In a modern estate practice, a lawyer is rarely called upon to draw an instrument creating interests in persons any more remote from the testator than his children, or occasionally his grandchildren.

[40] Strictly speaking, it seems clear that the historical purpose of RAP and perpetuities law is no longer the justification for today's rule. Sometimes it is argued that the modern equivalent of this historical purpose is to prevent large concentrations of financial wealth from not being used effectively for the greater benefit of the community and the economy, since trust investments are restricted to prudent, limited assets rather than being used as risk capital. Others assert that this argument is overstated, politically controversial and speculative at best.[54]

[41] However, a more generally accepted "modern purpose" has been formulated to support the continuing relevance of RAP and perpetuities law. It will be discussed next.

2. MODERN PURPOSE

[42] Although the specific historical conditions which gave rise to RAP are now gone, many still regard it as a good idea to balance a settlor's or testator's desire to control disposition of property far into the future with the need of those who must later use the property in changed times and circumstances. A testator or settlor cannot truly make informed decisions about the future because they cannot predict changes in family circumstances, the law, and social and economic conditions. Therefore, according to this view, RAP is still needed to serve as a general balancing mechanism between past and present.[55] This is said to be the "modern purpose" of perpetuities law.

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[52] Manitoba Report at 26.

[53] Saskatchewan Report at 3.

[54] The Law Reform Commission (Ireland), *Report on the Rule Against Perpetuities and Cognate Rules*, Report 62, (2000) at paras 4.05-4.06 [Ireland Report]. The Irish Commission recommended the abolition of perpetuities law.

[55] Law Commission (New Zealand), *Perpetuities and the Revocation and Variation of Trusts*, Issues Paper 22 (2011) at para 2.4 [New Zealand Issues Paper].

[43] If indeed such a modern purpose exists, it may be viewed narrowly as operating to balance the individual, bilateral interests of the original property owner with those of the future beneficiaries, or it may be viewed more widely as operating to benefit society by ensuring generally that property will be used to meet contemporary needs, not outdated ones.

[44] When ALRI first considered RAP in 1971, it affirmed the modern purpose's continuing value in Alberta. In doing so, it followed the lead of the English and Ontario law reform bodies. Both had given short shrift to any serious contemplation of abolition and viewed RAP (apart from its excesses) as enjoying general acceptance and satisfaction.[56] ALRI carried on this approach when it stated:[57]

> We think the policy of the Rule is sound. Property is for those who are living and the law should in general recognize their right and power to control it. We also think however that the law should recognize the right of an individual to make provision for those immediately succeeding generations in whom he may be expected to have a personal interest. We do not think that a man should be able to give his property to someone alive two hundred years hence, and most would agree that he should be able to give it, for example, to his children after his wife's death or to his grandchildren even though the gift will not vest immediately. In other words the owner of property should have some power to postpone its vesting after it leaves his hands, but that power should not be uncontrolled. As Professor Simes has said, "the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy." To the extent that the Rule achieves a balance between these desiderata it should be retained.

[45] Today, 45 years later, does the modern purpose of RAP and perpetuities law still respond to a pressing need in our society? As the Manitoba Law Reform Commission pointed out:[58]

> The law of the province should always be responding to real problems, not fanciful ones, whether it is the making of new law or the abolition of old law that is in question.

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[56] Law Reform Committee (England), *The Rule Against Perpetuities*, Fourth Report (1956) at para 4; Ontario Law Reform Commission, *Perpetuities and Accumulations*, Report No 1 (1965) at 4.

[57] Alberta Report at 2.

[58] Manitoba Report at 32.

[46] While some law reform commissions recommend abolition, others continue to uphold the ongoing need for and effectiveness of RAP's modern purpose. For example, when the Law Commission of England consulted on this question in the late 1990s, a "significant and very distinguished minority of those who responded" favoured abolition.[59] However, the majority of respondents argued for RAP's retention because:[60]

> Some respondents considered that the abolition of the rule could have adverse economic consequences. There was a widespread view that, if the rule were abolished, settlors would undoubtedly create future interests which they could not under the present law. Indeed, this was supported by evidence from a number of firms of solicitors who had clients who wished to do just that.

[47] With so-called "dynasty trusts," some wealthy people seek to use perpetual trusts created in non-RAP jurisdictions to keep funds (no longer land) within their family confines for successive generations. As noted by the *Harvard Law Review*, "[i]t is the desire to attract long-term trusts that has led to the repeal of the Rule in some 21 US states and certain Caribbean jurisdictions."[61] Since trust monies are invested, however, such trusts do not hinder economies in the way tying up land did in the old days. But still, dynasty trusts are clear examples of the desire to control property for future generations.[62]

[48] There is a strong financial incentive in the United States to create these perpetual dynasty trusts because they can be used to avoid the federal Generation Skipping Transfer Tax. [63] This has led to the proliferation of such trusts in states without RAP.[64] Although theoretically perpetual, most of these trusts are drafted "so that each generation is given a power to appoint the remainder to the next generation outright or in further trust, meaning the power of the dead hand is well and truly diminished without the need for the rule."[65] But even so, there was an attempt by the Obama administration to limit the

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[59] Law Commission (England), *The Rules Against Perpetuities and Excessive Accumulations*, Report 251 (1998) at para 2.25 [England Report].

[60] England Report at para 2.25.

[61] Notes, "Dynasty Trusts and the Rule Against Perpetuities," (2003) 116 Harv L Rev 2588 at 2590.

[62] For a good discussion of dynasty trusts, see Nova Scotia Report at 29-34.

[63] New Zealand Issues Paper at paras 3.25, 3.28.

[64] New Zealand Issues Paper at para 2.39.

[65] New Zealand Issues Paper at para 2.11, citing as authority RH Sitkoff and MM Schanzenbach, "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes" (2005) 115 Yale LJ 356 at 413.

Generation Skipping Transfer Tax exemption to 90 years in order to do away with dynasty trusts.[66]

[49] To the extent that RAP's modern purpose is to serve as a general balancing mechanism between past and present in order to handle future changes in family circumstances, the law, and social and economic conditions, the Law Reform Commission of Ireland pointed out that:[67]

> ... the Rule's operation is not a reaction to changed circumstances. The Rule focuses not on the suitability of the settlement as times change, (on which, indeed, it has nothing to say) but on the remoteness of vesting. Thus, whether or not a trust is void by reason of the Rule has nothing to do with whether or not that trust has become impractical or imprudent. The Rule operates in a blunt fashion and can apply equally to workable as to unworkable trusts.

[50] In other words, perpetuities law is not actually designed to address the alleged modern purpose. Therefore, in the opinion of the Irish Commission, "[i]f salvaging and re-modelling trusts which are no longer appropriate to the needs of the time is the objective,"[68] then the most effective way to do so is not to rely on perpetuities law, but to amend the trust using variation of trust legislation which operates in a more finely-tuned and comprehensive way.

3. CONSULTATION ISSUE

ISSUE 1

What valid social or legal purpose, if any, does perpetuities law serve in today's society? (please indicate all that apply)

(a) Perpetuities law does not serve a valid social or legal purpose in today's society.

(b) Perpetuities law benefits beneficiaries by balancing their need to use the property in changed times and circumstances with the settlor's or testator's desire to control disposition of property far into the future.

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[66] Deborah L Jacobs, "Obama Budget Takes Aim At Popular Wealth Transfer Tools" *Forbes* (3 April 2014), online: <www.forbes.com/sites/deborahljacobs/2014/03/04/obama-budget-takes-aim-at-popular-wealth-transfer-tools/>.

[67] Ireland Report, note 54 at para 4.10.

[68] Ireland Report, note 54 at para 4.11.

(c) Perpetuities law benefits society by ensuring that property will be used to meet contemporary needs, not outdated ones.

(d) Other (please specify).

C. Do Other Legal Mechanisms Now Perform RAP's Job?

1. INTRODUCTION

[51] Even if perpetuities law still serves a valid purpose in some circumstances, does it automatically mean that RAP is still the best legal mechanism to achieve that purpose? Do other legal mechanisms now exist which could adequately handle any perpetuities problems that may arise? As stated in the Saskatchewan Report:[69]

> The case for retention of the rule against perpetuities rests on the assumption that there still is a valid social purpose to be served by prohibiting perpetual clogs on the alienation of property. Although such schemes are rare at present, it is argued that some defence must be available in the event that a testator or settlor with peculiar notions undertakes to implement them. No doubt, the law should provide some protection against attempts to create perpetuities. The question, however, should not be whether such protection is required, but whether the rule against perpetuities is the most appropriate vehicle for implementing that policy. Reform of the rule has addressed some of its obvious inadequacies.... Nevertheless, the reformed rule cannot, by its very nature, eliminate all of the problems that exist under the common law. A British Columbia law professor, commenting on the Province's *Perpetuities Act*, concluded that "[the act] has removed the traps which abound in the common law ... [but] the Act has not made any simpler a technical and complex area of the law."
>
> If mechanisms are available to prevent the creation of perpetuities that do not depend on the inevitably difficult notion of remoteness of vesting, abolition of the rule would be preferable to reform.

[52] In contrast to earlier eras, two legal mechanisms exist today in Canada which many say are preferable to reliance on RAP as ways to control trust-based perpetuity problems stemming from remoteness of vesting, namely, our modern income tax system and court-ordered variation of trusts. This part will examine

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[69] Saskatchewan Report at 5-6. The British Columbia law professor's quotation cited in this passage is footnoted as: AJ McClean, "The British Columbia Perpetuities Act – a Primer," (1979) 13 UBC L Rev 240.

each of these mechanisms in detail. But first, mention will be made of certain other general considerations which are sometimes raised when assessing the effectiveness of those alternate mechanisms in a perpetuities context.

[53] Some proponents of retaining perpetuities law are concerned about the unparalleled intergenerational transfer of wealth from the pre- and post-World War II generations to future generations which is imminent in our society. If the modern purpose of perpetuities law continues to serve a valid and necessary purpose, is now really the time to abolish perpetuities law and rely instead on income tax laws and court variation powers to handle the disposing generations' temptation to tie up their wealth transfers far into the future? If so, we had better be confident in those alternate mechanisms' ability to do the job.

[54] Similarly, some express unease about relying on legislation passed to address completely different issues than perpetuity problems (and, in the case of income tax laws, passed by a jurisdiction other than Alberta). If the modern purpose of perpetuities law identifies the problem for which a statutory solution is needed, would it not be better to address that issue directly with legislation crafted specifically for that purpose?

[55] Finally, as noted in Chapter 2, Alberta has already repealed the old, received English statute forbidding accumulations of income beyond a very short period and now relies on the reformed RAP to control the situation instead.[70] If perpetuities law gets abolished in Alberta, then reliance will similarly have to be placed on the taxation system and variation of trusts legislation to control perpetual accumulations. The other Canadian jurisdictions which repealed or abolished RAP repealed the accumulations statute as well.

2. CONTROL OF PERPETUITIES ISSUES IN TRUSTS BY THE INCOME TAX SYSTEM

[56] The Manitoba Law Reform Commission stated, without going into any real detail, that the modern Canadian tax system worked against the long-term viability of successive trust interests:[71]

> It may not be the function of the tax laws to prevent perpetuities, but there is little doubt that the chief beneficiary of ... [an] accumulation trust would be the revenue authorities, whatever tax changes the future may bring.

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[70] Alberta Act, s 24(1)-(2).

[71] Manitoba Report at 32-33.

[57] In addition, the Manitoba Law Reform Commission also stated that the absence in Canada of succession duties and estate tax (apart from capital gains tax) had removed a major incentive for testators to create successive interest trusts in the first place.[72]

a. Effect on trusts of the deemed disposition rule

[58] Though the Manitoba Report only discusses the general topic of capital gains tax, it is likely referring in actuality to the effect of the 21-year deemed disposition rule (DDR) which is applicable under the *Income Tax Act* to trust property.[73] Both capital gains tax and DDR were introduced in 1972. Pursuant to DDR, the majority of trusts are deemed to dispose of and reacquire all trust property at fair market value every 21 years.[74] The purpose of DDR is to avoid an unlimited deferral of capital gains. However, the practical result for most trusts is that, every 21 years, they face a large tax exposure even though they may have little to no liquidity with which to pay it.[75]

[59] DDR applies, not to the trusts themselves, but to "eligible property" held within trusts. Basically, eligible property includes all shares, whether publicly or privately traded, all real property, whether used for personal or business purposes, and most types of personal property held in a trust.[76] Anything not within the *Income Tax Act* list of eligible property constitutes "ineligible property," the main examples of which are personal property held as inventory within a trust and life insurance owned by a trust.[77]

[60] DDR also does not apply to "exempt property." Section 108(1) of *Income Tax Act* defines this as property that is owned by a person who, because of their non-residence in Canada or a provision of another tax treaty, is not obligated to pay income tax in Canada under Part 1 of the *Income Tax Act*.

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[72] Manitoba Report at 36.

[73] *Income Tax Act*, RSC 1985, c 1, (5th Supp), s 104(4)-104(5.2) [ITA].

[74] David G Thompson, "The 21-Year Rule" (Continuing Legal Education Presentation delivered at Thorsteinssons LLP, 12 October 2010) at 4, online: <www.epcv.ca/documents/21%20Year.pdf> [Thompson]; BDO, "Remember the 21 Year Deemed Disposition Rule for Trusts", *The Tax Factor* 2011-03 (13 September 2011) 1, online: <www.bdo.ca/en/Library/Services/Tax/TaxFactor/Tax-Factor-2011-03.pdf>.

[75] William Bernstein, "Planning for Trusts Faced With The 21-Year Deemed Disposition Rule" (Toolbox Seminar delivered at Gardiner Roberts LLP, (2 December 2014) at 5, online: <www.grllp.com/publications/Planning%20For%20Turst%20Faced%20with%20the%2021-Year%20Deemed%20Disposition%20Rule.pdf> [Bernstein]. Under section 159(6.1), a trust may also furnish adequate security to the Minister and pay any tax owing over ten annual instalments.

[76] Thompson, note 74 at 11.

[77] Thompson, note 74 at 5.

[61] Certain types of trusts are expressly excluded from the application of DDR, so that it does not apply regardless of whether those trusts contain eligible property. For example, DDR will never apply to RRSPs, RESPs, TFSAs, registered pension plans or unit trusts.[78] The excluded trusts are largely special income plans, employee benefit trusts or pensions.

[62] Interests which have vested indefeasibly are also excluded from DDR because when such a beneficiary dies, it triggers a deemed disposition of their capital property immediately prior to death.[79] Therefore, DDR is not needed in order to capture those accrued capital gains within the trust.

b. Can a trust avoid DDR?

[63] The question arises as to whether a settlor might be able to convert eligible property into ineligible property before depositing it into a trust so that DDR would not apply. However, other than cash value life insurance or personal property held as inventory, there are not any obvious types of property that would lend itself to such an easy avoidance of DDR.[80] In other words, because of the wide range of property interests that are subject to DDR, "conversion" is not an effective avoidance strategy.

[64] There are two effective ways to avoid the application of DDR. First, prior to the trust's 21st anniversary, the trustee may distribute trust assets to Canadian resident beneficiaries on a tax-deferred basis.[81] This strategy is permissible because, once the trust assets are rolled over to the beneficiary, their death will trigger a realization of any accrued capital gains. Where available, this distribution strategy is the most common approach.

[65] Second, before the trust's 21st anniversary, the trustee may take steps to cause the trust interests of all Canadian resident beneficiaries to vest indefeasibly, thereby excluding the trust from the application of DDR.[82] This

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[78] ITA, note 73, s 108(1) (definition of "trust"); Thompson, note 74 at 6; Bernstein, note 75 at 6.

[79] ITA, note 73, s 70(5).

[80] See Caroline Rheaume, *Strategic Use of Trusts in Tax and Estate Planning*, (Toronto: CCH Canada Ltd, 2012) at 142, where the author posits that "A cash value life insurance policy could then be an attractive investment for personal trusts."

[81] ITA, note 73, s 107(2); Thompson, note 74 at 15-16; Bernstein, note 75 at 9.

[82] ITA, note 73, s 108, definition of trust, para (g); Thompson, note 74 at 27; Bernstein, note 75 at 21.

may be done by fixing the interests of the beneficiaries under a discretionary trust.[83] As an example:[84]

> ... a discretionary trust with six Canadian resident beneficiaries might, in advance of its 21-year deemed disposition date, cause each beneficiary's interest in the trust to vest indefeasibly so that the 21-year deemed disposition rule does not apply. The trust might provide that each beneficiary, or his or her estate, gets a 1/6 interest in the trust in 20 years. This could give the trustees control over ongoing management of the trust for the next 20 years....

[66] If the trust deed does not allow the trustee to cause an interest to vest indefeasibly, the trustee may be able to apply for a court variation of the trust under the applicable legislation.[85]

[67] None of these conversion strategies will work where there are non-Canadian-resident beneficiaries,[86] where the trustee is not authorized to distribute or encroach upon capital[87] or where it is an *inter vivos* trust to which the *Income Tax Act*'s attribution rules apply.[88]

c. Can DDR do RAP's job?

[68] If Alberta were to abolish RAP, would DDR constitute an adequate safeguard against perpetuity issues in trusts? In other words, does DDR replicate the effect of RAP and what it is designed to achieve?

[69] There are three possible scenarios that provide an answer to this question. First, a trustee may avoid DDR's tax consequences by distributing all of the trust capital to the beneficiaries prior to the trust's 21st anniversary. Since the beneficiaries' interests vest when that distribution is made, any perpetuity issues are resolved as of the date of distribution.

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[83] Nicolas P Smith, "Taxation of Personal Trusts" (Paper delivered at Tax Fundamentals for the Estate Practitioner, Continuing Legal Education Society of British Columbia, Vancouver, February 2011) at 4.1.6, online: <www.cle.bc.ca/PracticePoints/WILL/11-PersonalTrusts.pdf> [Smith]; Caroline Rheaume, *Strategic Use of Trusts in Tax and Estate Planning* (Toronto: CCH Canada Ltd, 2012) at 329-330.

[84] Thompson, note 74 at 27.

[85] Bernstein, note 75 at 23-24.

[86] Bernstein, note 75 at 12; ITA, note 73, s 107(2.1), (5).

[87] *Eaton v Eaton-Kent*, 2013 ONSC 7985.

[88] Smith, note 83 at 4.1.6-4.1.8.

[70] Second, the trustee may ensure that all of the beneficiaries' interests vest indefeasibly prior to the trust's 21st anniversary. Since the beneficiaries' interests have vested within 21 years of the trust's creation, there are no perpetuity issues.

[71] Third, the trustee may do nothing. In this scenario, the trust would be taxed with capital gains on its 21st anniversary. Perpetuity issues will be present because the beneficiaries' interests will not yet have vested. However, provided the trustee continues to pay capital gains tax every 21 years, the trust could (in the absence of RAP) continue indefinitely.

[72] In most circumstances, it would surely be rare to find a trustee or settlor who would delay vesting for so long that DDR was continuously triggered. However, there may be legitimate reasons why a trustee would decide to repeatedly subject a trust to the application of DDR. For example, the tax consequences of the deemed disposition may be insignificant, like where the asset has a high cost base such as public company shares that are regularly traded. In this situation, the trustee may prefer to pay the nominal capital gains tax in order to keep the trust intact.

[73] There may also be non-tax considerations that make the distribution of trust assets unattractive. For example, if the purpose of the trust is to provide for disabled beneficiaries, the trustee or settlor may be content to pay capital gains tax every 21 years until the disabled beneficiary dies.[89] Or, shares in a family business may be held in trust for the business-owner's children. If the purpose of the trust is to provide income from the shares to the beneficiaries without giving them full control over the shares, it may be preferable to leave the shares in trust and pay the capital gains tax every 21 years. In such situations, the inconvenience and expense of paying capital gains tax may be more attractive than the loss of control that accompanies distribution of shares to the beneficiaries.

[74] It should also be noted that DDR would not operate to prevent the perpetual existence of trusts containing ineligible or exempt property, or to special income, pension or employee benefit trusts excluded by the *Income Tax Act*.

[75] Accordingly, while DDR alone could, in practice, reduce the incentive to create long-lasting trusts of unvested interests, it would still be technically possible to create them. In other words, DDR cannot be characterized as a complete replacement for RAP where trusts are concerned.

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[89] Smith, note 83 at 4.1.6.

[76] Without specifying any analysis, ALRI reached this same conclusion in its 1971 report (which predated DDR and capital gains tax provisions of today):[90]

> In our opinion however, although tax laws may have a deterrent effect on efforts to postpone vesting for an undesirably long time, they do not provide a complete substitute for the Rule and should not be relied upon to effect the desired policy in connection with future dispositions of property.

[77] A contrary opinion was recently expressed by the Law Reform Commission of Nova Scotia when it said:[91]

> ... it seems clear enough that while taxes and variation of trusts legislation may not completely restrict the possibility of perpetual trusts, they do a great deal to ensure that the pool of property held pursuant to such trusts (and thus removed from the available pool of risk capital) will be relatively small.

The Commission further noted that tax law works to effect "substantial public redistribution of assets held in trusts of sufficient duration."[92] Any long-term trusts of unvested interests which do exist will likely be taxed over and over again to the benefit of society.

d. Consultation issue

ISSUE 2

One modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our income tax system's 21-year deemed disposition rule. Is this tax rule a viable and adequate control of the situation?

3. CONTROL OF PERPETUITIES ISSUES IN TRUSTS BY COURT VARIATION OF TRUSTS LEGISLATION

a. Strengths and limitations of court variation of trusts legislation

[78] In addition to modern income tax law, the 20th century saw a second critical legal development, one which would have been unthinkable in past eras. Starting about 60 years ago, modern trustee statutes began to codify the common law rule in *Saunders v Vautier* that a trust can be varied or terminated if all the

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[90] Alberta Report at 3.

[91] Nova Scotia Report at 32.

[92] Nova Scotia Report at 34.

beneficiaries of the trust are of full capacity and in agreement. If the trust is terminated, the beneficiaries would then receive absolute ownership of the trust property. But modern trust variation legislation goes much further and typically empowers a court to give substituted consent on behalf of any beneficiaries who are minors, incapacitated, unborn or even unascertained. This development means that "to a very large extent trusts in favour of persons in succession now remain in effect only with the willingness of the adult and capacitated beneficiaries that they do so"[93] together with discretionary court consent on behalf of those who cannot consent for whatever reason. As a result of the work of the Institute of Law Research and Reform (now ALRI), Alberta has had such modern trust variation legislation since 1973.[94]

[79] The Manitoba Law Reform Commission was the first to suggest that this modern statutory scheme is now the true source of balance between the competing interests of the settlor or testator and their present and future beneficiaries. RAP may have provided this balance in earlier centuries, the Commission said, but is no longer the best way to accomplish it today.[95] The other Canadian law reform bodies which recommend abolition of RAP consistently affirm this analysis as well.

[80] However, this view does have its critics. Even in the Manitoba Report, a dissenting commissioner expressed concern about substituting judicial discretion to vary or terminate for the complex, but known, dictates of RAP. According to him, a court acting under the trusts variation statute:[96]

> ... would be constrained in the exercise of its discretion only by vague and occasionally hard-to-reconcile statutory directions that it consider both benefit to the beneficiaries and the intentions of the settlor. This risks replacing existing but curable complexity with the continuing uncertainty that flows from a loosely governed discretion exercised on a case-to-case basis.

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[93] Manitoba Report at 43.

[94] Institute of Law Research and Reform (Alberta), *The Rule in Saunders v Vautier*, Report 9 (1972), online: <www.alri.ualberta.ca/docs/fr009.pdf >. The Institute's recommendations were implemented by *The Attorney General Statutes Amendment Act, 1973*, SA 1973, c 13, s 12 amending the *Trustee Act* (now RSA 2000, c T-8, s 42).

[95] Manitoba Report at 52-53.

[96] Manitoba Report at 64-65.

[81] The Law Commission of England summarily rejected variation of trusts legislation as a sufficient replacement for RAP.[97] However, as noted by the Law Reform Commission of Nova Scotia, it "conspicuously, did not explain why."[98]

[82] Saskatchewan accepted that variation of trusts legislation could be a viable substitute for RAP and noted an important point that:[99]

> Applied to perpetuities problems, variation of trusts legislation would operate in much the same manner as a general *cy-pres* jurisdiction.... At the same time, unlike the *cy-pres* provisions contained in [RAP] reform legislation, a variation of the trust would not force a rearrangement simply to bring the trust within the rule against perpetuities. A variation would be justified only when it could be demonstrated that the existence of remote interests is a source of real inconvenience for the trust as a whole.

[83] The ULCC's draft *Uniform Trustee Act* includes the latest and most comprehensive version of variation of trusts provisions designed to act, among other things, as a replacement for a repealed RAP. In this model, not only can a court give substituted consent on behalf of beneficiaries who are minors, incapacitated, unborn, missing or unascertained, a court can also give substituted consent to override the objections of a dissenting beneficiary if certain conditions are met.[100] It is the strongest model yet that could be used to overcome a long-term trust of unvested successive interests, if the majority of current beneficiaries and the court (acting as substitute decision-maker) agree to vary or terminate the trust.

[84] ALRI has recently made preliminary recommendations supporting adoption of this uniform model in Alberta, with a few differences to strengthen the model further.[101] ALRI is seeking feedback regarding what scope there should be for variation or termination of trusts without court approval.

[85] One disadvantage of relying on variation of trusts legislation to deal with perpetuities issues in trusts is that a court application must be made, which can

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[97] England Report at paras 2.19, 2.25.

[98] Nova Scotia Report at 32.

[99] Saskatchewan Report at 25.

[100] Nova Scotia's legislation was amended in 2011 to have the same feature: *Variation of Trusts Act*, RSNS 1989, c 486, s 3(4).

[101] Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Report for Discussion 28 (2015), online: <www. alri.ualberta.ca/docs/rfd028.pdf>. See Chapter 14 "Variation and Termination of Trusts" at 127-140.

be costly. The expense of litigation may be viewed as an access to justice issue, since not everyone can afford it.

b. Consultation issue

ISSUE 3

Another modern legal mechanism which some suggest would be a sufficient control of perpetuities issues in trusts is our court variation of trusts legislation, as bolstered by the ULCC reforms. Is this variation power a viable and adequate control of the situation for dispositions created by trust?

4. HAVE OTHER CANADIAN PROVINCES EXPERIENCED POST-ABOLITION LEGAL PROBLEMS?

[86] Have Manitoba, Saskatchewan and Nova Scotia experienced any post-abolition legal problems? Donovan Waters, the Canadian trusts expert who wrote the Manitoba Report for the Manitoba Law Reform Commission, advises that he is unaware of any occasion since RAP's abolition in Manitoba that anyone would have needed to invoke RAP to deal with a problem. He further advises that he keeps in touch with both Canadian and American jurisdictions which have abolished perpetuities law and has "yet to learn of problems that have arisen that retention of the Rule would have prevented."[102] There does not appear to be any significant Manitoba case law since the 1982 abolition which involves substantive problems stemming from the lack of perpetuities law.[103]

[87] A couple of post-abolition cases have been reported in Saskatchewan. In *Re Swenson Estate*, a will devised farmland in perpetuity via a series of successive life estates in order to achieve the testator's "intention that the land not be sold but remain with my parents' descendants."[104] The court used its variation power under *The Trustee Act, 2009*[105] and the rule in *Shelley's Case* to vary the testamentary trust so that the first life tenant received absolute title.

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[102] Email from Donovan Waters QC to Peter Lown QC, ALRI Director (24 September 2013).

[103] One case simply noted that, had RAP still been the law in Manitoba, a non-charitable purpose trust at the centre of the case would likely have been void for violating it. The validity of the trust, however, ultimately turned on whether it could be enforced by individual band councils and chiefs, which the court held it could: *Keewatin Tribal Council v Thompson (City)* (1989), 61 Man R (2d) 241(QB).

[104] *Re Swenson Estate*, 2012 SKQB 540 at para 4.

[105] *The Trustee Act, 2009*, SS 2009, c T-23.01, s 51(1).

[88] In *Re Moore Estate*, a sizeable estate was left on perpetual trust with no residuary beneficiaries in order to fund small annual donations to animal protection and student scholarships.[106] The donations would use only a small part of the annual income and so the estate would create large accumulations as well. In an effort to use all the annual surplus income, the executor-trustee applied to court to vary the will to increase the donation amounts. The court noted the repeal in Saskatchewan of RAP and of the similar law against accumulations. The court also noted that, as a testamentary trust, the estate would pay hefty income tax each year, as well as potential capital gains tax every 21 years due to the DDR. Another problem is that the executor-trustee would be obliged to administer the estate for the rest of his life, and his descendants after him. The court referred to its variation powers under *The Trustee Act, 2009*[107] as the means by which these problems could be resolved. It then adjourned the case indefinitely so that up-to-date valuations and information about long-lost relatives could be sought. This information has now been filed and the estate is awaiting the court's direction.[108]

[89] The important point about these two Saskatchewan cases is not that legal problems arose, but that the court had adequate variation powers to resolve them. On the other hand, it could be argued that the application of RAP (whether reformed or unreformed) would have dealt with such problems swiftly and less expensively.

[90] There is no reported case law in Nova Scotia since the 2011 abolition of its perpetuities law.

D. Consultation Issue

ISSUE 4

Taking all factors into consideration, such as any modern purpose of perpetuities law together with the potential control of perpetuities issues in trusts by income tax law and the power of courts to vary trusts, should perpetuities law be abolished or retained in Alberta?

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[106] *Re Moore Estate*, 2013 SKQB 410.

[107] *The Trustee Act, 2009*, SS 2009, c T-23.01.

[108] Telephone conversation between Scott Moffatt, Counsel, Holliday & Company – Wm H Law PC Inc, and Debra Hathaway, ALRI Counsel (10 February 2016).

CHAPTER 4

If Perpetuities Law Is Retained, Is Reform Needed?

A. Introduction

[91] If abolition is rejected and the decision is made that Alberta continues to need a perpetuities law as a balancing mechanism between past and present, it is not the end of the matter. The next question to ask is whether RAP continues to be the most effective way to achieve it? Retaining the Alberta Act's control of perpetuity issues does not foreclose examining how a perpetuity period should best be expressed in that statute. Therefore, this chapter will examine current reform options.

B. Should the Perpetuity Period be Redefined and Simplified?

1. IS REFORM NEEDED?

[92] The argument can be made that the current Alberta Act appears to be working well as a balancing mechanism and effectively curbs the worst excesses of RAP. Reported court decisions are few and rarely are any dispositions struck down for violation of perpetuities law.

[93] In the 44 years since the enactment of the Alberta Act in 1972, there have been only eleven related court decisions reported in Alberta. Four cases involved estates and trusts situations. Seven cases involved commercial transactions (primarily options to purchase). Of the total eleven cases, the courts found that four did not turn on perpetuities issues or arguments on those issues were not raised or were abandoned.[109] Five cases were saved by the Alberta Act.[110] Only two cases were invalidated – both commercial transactions and both because

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[109] *Estate of Russell (Re)* (1978), 9 AR 427 (SC); *Friends of the Calgary General Hospital Society v Canada*, 2000 ABQB 43, aff'd 2001 ABCA 162 at para 5; *Peace Hills Trust Co v Canada Deposit Insurance Corp*, 2007 ABQB 364; *Sprague-Rosser Contracting Co Ltd v 572757 Alberta Ltd et al*, 2013 ABQB 205 (Master), aff'd 2013 ABQB 363.

[110] *Roberts v Hanson* (1981), 28 AR 271 (CA); *Caplan Estate v Alberta (Public Trustee)*, 1984 CarswellAlta 585 (Surr Ct); *BCE Development Corp v Cascade Investments Ltd* (1987), 80 AR 386 (QB), aff'd (1987), 56 Alta LR (2d) 349 (CA); *Hay v Edmonton Savings & Credit Union Ltd* (1989), 103 AR 123 (QB Master); *Thiessen v Savage* (1996), 190 AR 154 (QB).

they were subject to the pre-1972 common law RAP and so could not be saved by the Alberta Act's wait and see rule.[111]

[94] The Alberta Act and RAP can exclude certain trusts if such an exemption is needed for wider social purposes. For example, the Alberta Act has always had a statutory exemption for employment-related pension, retirement and other employee benefit plans.[112]

[95] Two further exemptions not related to trusts were recently enacted which facilitate the operation of Alberta's resource-based economy. Mineral leases are now exempt from RAP's application to the possibility of reverter and rights of re-entry associated with a lessor's interest under a mineral lease.[113] RAP also does not apply to any "qualifying environmental trust" created after December 31, 2013.[114] These are reclamation trusts, established as long-term funding mechanisms for environmental cleanup in the oil and gas industry. Exempting them from RAP allows such trusts to exist well beyond the perpetuity period as needed. Otherwise, these trusts would be forced to "work around" RAP by being wound up and having the trust monies resettled in a new reclamation trust once every 75 years, before the end of the Alberta Act's wait and see period.[115] For trusts serving such an important social and environmental purpose, it is better to simply provide an "up front" exemption.

[96] The downside of the Alberta Act's *status quo* is that it still requires lawyers to learn and understand RAP in order to apply the Act to save those dispositions which contravene it. As noted by the Law Reform Commission of Saskatchewan:[116]

> The rule against perpetuities is perhaps the most notorious example of "lawyer's law". It is a complex and technical body of law apparently beyond the grasp of most laymen, and not a few lawyers.

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[111] *Sullivan v Newsome* (1987), 78 AR 297 (CA); *PanCanadian Petroleum Ltd v Husky Oil Operations Ltd* (1994), 163 AR 367 (QB).

[112] Alberta Act, s 22.

[113] Alberta Act, s 19(0.1), (5), enacted in 2013.

[114] Alberta Act, s 22.1, enacted in 2014.

[115] See the discussion of this issue in: National Energy Board of Canada, *Reasons for Decision: Set-aside and collection mechanisms*, MH-001-2013 (May 2014) at para 2.9.3, pp 32-33, online: <docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/782060/927998/946532/2478727/Reasons_for_Decision_-_Set-aside_and_collection_mechanism_MH-001-2013_-_A3X4G5.pdf?nodeid=2477576&vernum=-2>.

[116] Saskatchewan Report at 1.

[97] The main argument for reform of the Alberta Act is that other, simpler and more straightforward ways exist to impose an appropriate perpetuity period than by reliance on the difficult and arcane RAP. These alternate methods will be explored in the next section.

ISSUE 5

Should the perpetuity period of the *Perpetuities Act* be redefined and simplified?

(a) No, retain the perpetuity period found in the Act.

(b) Yes, the perpetuity period should be redefined and simplified.

2. THREE MODELS OF REFORM

[98] If reform is needed, what models might be simpler and more straightforward ways to impose an appropriate perpetuity period than reliance on lives in being, vesting and RAP? Three models are commonly found in reform statutes or proposals:

- Allow a choice between RAP's perpetuity period calculated by reference to lives in being and a fixed perpetuity period for vesting
- Codify RAP, eliminate lives in being and legislate a fixed perpetuity period for vesting
- Replace RAP and vesting: legislate a fixed duration period for trusts instead.

Each of these alternate models will now be examined in turn.

a. Allow a choice between RAP's perpetuity period calculated by reference to lives in being and a fixed perpetuity period for vesting

[99] As previously mentioned, some jurisdictions which use the wait and see principle allow the testator or settlor to choose whether to use RAP's perpetuity period calculated by reference to lives in being as their default perpetuity period or, alternatively, to specify in the instrument a fixed perpetuity period (typically 80 years) within which interests must vest. Until recently, this choice was the

model used in England.[117] It is also available in some Australian states.[118] But giving testators and settlors the option to use a different perpetuity period than RAP is not the typical Canadian approach. Of the six provinces which have reformed RAP, only British Columbia offers this option.[119]

[100] ALRI considered this option in its 1971 Alberta Report and, following the lead of its Ontario counterpart, rejected it:[120]

> The Ontario Law Reform Commission considered the English provision and recommended against its adoption. They thought it would encourage testators to use the 80 year period and hence postpone vesting for a long time. True they can do so now by use of a royal lives clause but should not be tempted by an additional method. An innovation of this kind in perpetuities law would be unwise. After long deliberation and considerable difference of opinion we have decided to take the Ontario position. As far as we can ascertain, royal lives clauses are rare in Alberta wills and settlements – indeed none has come to our attention. They have been used on occasion in commercial transactions where they are inappropriate and our subsequent recommendations in connection with commercial transactions provide for periods of years to the exclusion of lives in being. There is a further reason, though not the major one, for rejecting an 80-year period. The comments to date on the various Acts that have adopted it show that the draftsman of a will or settlement would have to be particularly careful to succeed in bringing his disposition within the provision.

[101] A "royal lives clause" establishes a long perpetuity period by using as lives in being the survivors of a named royal person's issue alive at the effective date of the instrument.[121] These clauses are most effectively used where no natural lives in being exist because they significantly extend the minimal 21 year perpetuity period which would otherwise result. In Alberta, for example, royal

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[117] *Perpetuities and Accumulations Act 1964* (UK), c 55, based on the work of the Law Reform Committee (England), *The Rule against Perpetuities*, Fourth Report (1956).

[118] See, e.g.: *Perpetuities and Accumulations Act 1968* (Vic), s 5 and *Perpetuities and Accumulations Act 1992* (Tas), s 6.

[119] *Perpetuity Act*, RSBC 1996, c 358, ss 6-7.

[120] Alberta Report at 13.

[121] Typically, these clauses implicate a large set of lives, thereby creating a greater likelihood that one member of that class might live until 90 or even 100. Such a survivor's age plus 21 could result in a perpetuity period of 111 or 121 years, respectively.

lives clauses routinely appear in commercial oil and gas operating agreements and other related agreements such as farmout agreements.[122]

[102] But what about ALRI's fear that the English option would encourage people to use the theoretically longer 80 year period to postpone vesting? Subsequent evidence from England is that relatively few testators and settlors actually use the option. In its 1998 review of the English model, the Law Commission of England noted that the option was introduced in order to reduce disponors' (testators' and settlors') reliance on the problematic concept of lives in being as the means of determining the vesting period. However, it didn't work out that way in practice:[123]

> It was clear from responses on consultation that in many cases the 80 year perpetuity period is not sufficiently long to persuade disponors to abandon the traditional common law perpetuity period of a life in being plus 21 years and, in particular, the use of "royal lives" clauses.

[103] In any event, given that ALRI rejected giving this choice in 1971 and England itself has now abandoned it, this option seems to be the weakest of the three alternatives as a beneficial or feasible reform today.

b. Codify RAP, eliminate lives in being and legislate a fixed perpetuity period for vesting

[104] Implementing recommendations of its Law Commission, England has now moved to a model which codifies RAP and legislates a fixed perpetuity period of 125 years within which interests must vest. No longer is RAP a common law rule modified by statute but still subject to centuries of case law. It is now completely codified and exists only as statutorily provided in the *Perpetuities and Accumulations Act 2009*.[124] All the law concerning lives in being and how to determine the perpetuity period using this concept is now

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[122] See, for example, clause 1.12 of the Canadian Association of Petroleum Landmen's Operating Procedure used as an industry standard:

> **Limitation on Right of Acquisition**
>
> Notwithstanding any provision herein, a Party's right to acquire a Working Interest hereunder will not extend beyond the period prescribed by applicable perpetuities Regulations or, in the absence of those Regulations, 21 years after the lifetime of the last survivor of the lawful descendants now living of Her Majesty, Queen Elizabeth II.

Canadian Association of Petroleum Landmen, "Operating Procedure" (2007), online: <www.landman.ca/pdf/operating_procedures/2007/final/2007%20Operating%20Procedure%20Text%20(Final%20Annotated%20Version%202008).pdf>.

[123] England Report at para 8.2.

[124] *Perpetuities and Accumulations Act 2009* (UK), c 18, s 1 [England Act].

obsolete.[125] The concept of vesting is still central to the codified perpetuities model but the perpetuity period for vesting is now a fixed number of years set solely by statute. The wait and see principle and certain other savings techniques remain in place, however, to save potentially troublesome interests.

[105] England sought to legislate a rational perpetuity period which would strike an appropriate balance between the rights and needs of the past and present but would also do so "with a far greater degree of simplicity than does the present law."[126] The Law Commission recommended a single, fixed perpetuity period for vesting of 125 years for two reasons. First, it probably represents the longest vesting period that could be obtained under RAP using a royal lives clause, rather than the shorter average length of a life in being and 21 years. Second, "the adoption of a long perpetuity period gives some recognition to the views of those who considered that the rule should be abolished altogether."[127] As the Commission noted:[128]

> The effect of adopting a 125-year period is to place a limited restriction – a long stop – on what settlors and testators wish to do, while recognizing that other factors, such as taxation, are likely in most cases to lead to the final vesting of property under a trust or settlement long before the end of the 125-year period.

[106] It is not possible to contract out of the fixed perpetuity period nor to vary it by instrument. This automatic applicability of the 125-year period:[129]

> ... would have the desirable incidental effect of shortening many trust instruments. It should be emphasized that although the perpetuity period would be overriding, there would be nothing whatever to prevent a settlor or testator providing for a trust to terminate after a much shorter period of years than 125. Indeed we foresee that this might in practice become quite common.

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[125] England Report at para 7.30. The Law Commission noted that, since lives in being are now irrelevant under its recommended model, there is also no need to consider issues arising from modern reproductive technology: England Report at paras 8.32-8.34. Even where lives in being are used to calculate the perpetuity period, however, ALRI has already concluded that an after-born child need not be considered when applying gift-saving rules in Alberta's perpetuity legislation: Alberta Law Reform Institute, *Assisted Reproduction After Death: Parentage & Implications*, Final Report 106 (March 2015) at paras 100-104, online: <www.alri.ualberta.ca/docs/FR106.pdf>.

[126] England Report at para 8.9.

[127] England Report at para 8.13.

[128] England Report at para 8.13.

[129] England Report at para 8.14.

[107] Legislating a fixed perpetuity period, however, does not mean that certainty of vesting must be established at the commencement of the trust. The England Act retains the wait and see principle and some of the other gift-saving devices present in the former statute, such as the class-splitting rule to avoid failure for remoteness. However, gift-saving devices or other provisions designed to address the intricacies of calculating lives in being plus 21 years are now obsolete and have been omitted from the England Act, such as presumptions concerning fertility and parenthood, age-reduction provisions to prevent remoteness, and provisions concerning surviving spouses as lives in being.[130]

[108] It is arguable that the new English approach simply does not address the hard central issue of abolition. The long perpetuity period, combined with the generous wait and see principle and the narrowed scope of the law's applicability (discussed later in Chapter 5 of this report) significantly reduce the ambit of perpetuities law.

[109] As noted by the English Law Commission, taxation law operates regardless of whatever the fixed perpetuity period may be. Therefore in Canada, in regard to trusts, keep in mind that the 21-year deemed disposition rule would still significantly reduce the number of long-lasting trusts of unvested interests, although any which choose to accept the tax penalty will still persist and will ultimately be curtailed by the fixed perpetuity vesting period.

c. Replace RAP and vesting: legislate a fixed duration period for trusts instead

[110] When RAP arose in the 17th century, "[c]ommon law property interests were essentially based on the length of lives."[131] Also, because property rights were conferred upon vesting of an interest, regardless of when actual possession of the land occurred, the intricacies of vesting were important legal issues. Since property law was so focused on these two concepts, lawyers and courts of the time naturally thought in terms of lives in being and vesting when crafting RAP's restriction of perpetuities. As a result, RAP's main formulation as the rule against remoteness of vesting is concerned with:[132]

> ... the *commencement* of interests rather than with their duration, though by restricting the time within which future interests may be

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[130] England Report at paras 8.25-8.29.

[131] Manitoba Report at 10.

[132] England Report at para 1.6 [emphasis in original].

> created, the rule may (and commonly will) have the effect of limiting the life of a trust.

[111] RAP directly restricts duration only in its second formulation as the rule against perpetual trusts, which has a narrow application only to non-charitable purpose trusts. Here RAP focuses on duration simply because such trusts rarely have any lives in being and so RAP restricts their existence to a straight 21 years of operation.

[112] In contrast to the two other examples of RAP reform discussed in this part, the Law Commission of New Zealand proposes a more radical (and perhaps more modern) solution for setting a perpetuity period. It recommends completely replacing RAP and its concepts of lives in being, vesting of interest and remoteness, and instead recommends legislating a fixed duration period or limit for trusts. This approach requires no complicated calculations to determine the perpetuity period. In addition, because the perpetuity period is certain at the commencement of the trust, there is also no need for the wait and see approach or any other saving provisions. Validity or invalidity of a trust will be immediately apparent based on whether it complies with the fixed duration period or not.

[113] New Zealand's approach focuses solely on trusts because it also recommends that perpetuities law should no longer apply to non-trust equitable and common law interests, including commercial interests. This issue of perpetuities law application beyond trusts will be examined more fully in Chapter 5 of this report.

[114] New Zealand currently has a reformed, "wait and see" RAP statute based on the former English model.[133] In its recent review of trust law, the Law Commission of New Zealand rejected abolishing perpetuities law altogether because, in its opinion, prudent social policy requires the presence of some kind of perpetuity period. Nor would New Zealand tax law suffice to curb perpetual trusts.[134] However, the Commission rejected further reliance on RAP and its central concepts of vesting and lives in being because that body of law is complex, uncertain, not well understood and causes problems in both drafting and practice.[135] While the current statute has ameliorated the worst of the

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[133] *Perpetuities Act 1964* (NZ), 1964/47.

[134] Law Commission (New Zealand), *Review of the Law of Trusts: A Trust Act for New Zealand*, Report 130 (2013) at paras 17.7-17.8 [New Zealand Report].

[135] New Zealand Report at para 17.5.

problems of the unreformed common law RAP, it is still necessary to determine that a trust offends the unreformed RAP before the wait and see saving provisions of the statute can be applied to save it. Therefore, despite the presence of the reform statute, lawyers and drafters still need to know and understand all the difficult and arcane complexities of the unreformed RAP.[136]

[115] Moreover, while the wait and see provision can save trusts, it creates its own kind of difficulties:[137]

> The wait and see approach does not resolve uncertainty, as whether or not the rule applies is not known at the outset as it is at common law. If it is not clear whether a gift will vest, a court decision as to its validity may well be delayed until near to the end of the period.

[116] Therefore, as stated by the Commission:[138]

> Our recommendation is to repeal the outdated rule against remoteness of vesting, and create a statutory maximum duration for trusts of 150 years. This would address the practical concerns expressed by those who favoured reform or complete abolition, through providing a bright-line rule that is easy to understand and promises certainty in trust dealings. It would prevent perpetual trusts, while allowing a high degree of flexibility for settlors to dispose of property as they choose.

[117] The upper limit of 150 years was chosen because of increasing life expectancies and also to allow existing trusts established for the duration of a life in being plus 21 years to continue until their natural end.[139] While the statute would prescribe a default fixed duration limit of 150 years, the terms of the trust could specify a shorter period, if desired. At the 150 year mark (or shorter period specified in the trust), the trust property must pass to an absolute owner in accordance with the terms of the trust or, if none, absolute title will pass by operation of law to all surviving beneficiaries in equal shares.[140]

[118] As previously discussed, taxation law operates regardless of whatever the fixed perpetuity period may be. Therefore in Canada, in regard to trusts, keep in mind that the 21-year deemed disposition rule would still operate to significantly reduce the number of long-lasting trusts, although any which choose to accept

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[136] New Zealand Issues Paper at paras 2.33–2.34.

[137] New Zealand Issues Paper at para 2.35.

[138] New Zealand Report at para 17.9.

[139] New Zealand Report at para 17.12.

[140] New Zealand Report, Recommendation R49 at 218. See also New Zealand Issues Paper at para 3.44.

the tax penalty will still persist and will ultimately be curtailed by the fixed perpetuity period's duration limit.

[119] In the 1990s, the Law Commission of England briefly examined the option of a duration rule, but rejected it.[141] While a fixed duration period might appear to be simpler to operate, it said, any such law would in fact also need various special statutory provisions to prevent problems. At the end of the duration period, the property could not simply revert by resulting trust back to the settlor or the settlor's personal representatives because this would create major problems with taxation of trusts in the interim. But if the statute directs that absolute title to the property will pass by operation of law, it "could be open to objection on the ground of unjustifiably violating the intentions of the disponor."[142] However, as the New Zealand model shows, a prudent settlor or testator may provide in the trust instrument for the ultimate absolute disposition of the property at the end of the period, and only in default of this would it pass by operation of law.

[120] The English Commission's second main objection was that the statute must prevent the settlor from resettling the trust property into a further trust at the end of the duration period:[143]

> Resettlement of remote interests at the outset would, if permissible, be a straightforward means of circumventing the duration rule, yet any legislation to prevent it would, in effect, be a rule against remoteness of vesting. Thus the effective enforcement of a duration rule would require a form of rule against perpetuities, albeit perhaps simplified, to operate alongside it. For this reason we take the view that the attraction of a duration rule in terms of simplicity is more apparent than real.

[121] As already noted, the New Zealand model provides that any disposition by the settlor at the end of the duration period must be of absolute title. The solution to the resettlement issue does not seem unduly complex.

[122] Moreover, long before New Zealand re-examined this model, both the English Commission's major concerns were directly addressed in an academic

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[141] The Law Commission (England), *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations*, Consultation Paper 133 (1993) at paras 5.50–5.55 [England Consultation Paper]; England Report at paras 2.19, 2.25. The idea also apparently did not garner a lot of support on consultation: England Report at para 2.25.

[142] England Consultation Paper, note 141 at para 5.52.

[143] England Consultation Paper, note 141 at para 5.53.

article by Peter Sparkes, who wrote in response to the English Commission's Consultation Paper:[144]

> The rule against perpetuities should ... be directed to the overall duration of the trust. The rule should require the property to revert to an absolute owner by the end of the perpetuity period or a number of absolute owners concurrently entitled. The rule against perpetuities would then not be based on the mysterious and outdated concept of vesting. Instead the rule would take this form:
>
> > The trust property must pass to one or more absolute owners by the end of the perpetuity period.
>
> Or, to put it another way:
>
> > An interest must take effect in possession within the perpetuity period.
>
> The only provision needed to complete the scheme would be rules directing the vesting of trust property at the end of the perpetuity period. A life interest in possession at the end of a perpetuity period could be executed to become a fee simple interest.
>
> This proposal is, in a sense, for a rule of duration, but not a pure rule of duration; it would not permit an advance direction for resettlement. The duration governing the trust would be from the initial direction to hold in trust to the final taking effect in possession.

[123] The rest of the English Commission's objections to a duration rule were equally applicable to a traditional vesting rule, such as the need for exceptions for charitable trusts, pension plans and employee benefit plans, and so do not seem compelling arguments against a duration rule.

[124] The proposed New Zealand reform does differ in one important way from the other two examples of RAP reform discussed in this part. Both of those models based on a vesting rule have been enacted in legislation. The New Zealand model based on a duration rule has not yet been implemented. It is unclear whether it will be.

[125] The New Zealand government has taken all the Law Commission's recommendations about trust law (including perpetuities) under advisement. It has appointed seven expert trust lawyers to a Trusts Reference Group, which is currently conducting further analysis of all the proposals. The Trusts Reference Group will advise the Minister of Justice on the creation of new legislation. A

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[144] Peter Sparkes, "How to Simplify Perpetuities" (1995) 59 Conv 212 at 215-216.

draft bill will be released for public consultation before it is introduced in the New Zealand parliament.[145] The time frame for this review and consultation is unknown.

d. Consultation issue

ISSUE 6

If the *Perpetuities Act* should be reformed by redefining and simplifying the perpetuity period, what would be the best way to do so?

(a) Allow the person who grants the interest to choose between using the rule against perpetuities' perpetuity period calculated by reference to lives in being or an alternate vesting period specified in the instrument which does not exceed a fixed period, while retaining the wait and see principle.

(b) Completely codify the rule against perpetuities, eliminate lives in being and legislate a fixed vesting period, while retaining the wait and see principle.

(c) Completely replace the rule against perpetuities, lives in being, vesting and the wait and see principle and legislate a fixed duration period for trusts instead.

(d) Other (please specify).

3. FOUR POTENTIAL MAXIMUM TIME PERIODS

[126] Regardless of which reform model is chosen, each one specifies a maximum time period within which its particular perpetuity period will operate. Although it is always acceptable for future or contingent interests to vest or terminate before this time limit is reached, a maximum time period needs to be specified as an end point.

[127] The reform models under discussion each specify a different maximum time period: 80 years, 125 years or 150 years. The shorter the time period, the tighter is the perpetuity period's control of when the future or contingent interests must be resolved. An 80 year perpetuity period is already used in the

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[145] "Minister puts trust law reform on agenda," Scoop Media (29 May 2015), online: <www.scoop.co.nz/stories/PA1505/S00584/minister-puts-trust-law-reform-on-agenda.htm>; New Zealand Government, "Government response to Law Commission report 'Review of the Law of Trusts: A Trust Act for New Zealand,'" undated, online: <www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-review-of-the-law-of-trusts-a-trusts-act-for-new-zealand/index>.

Alberta Act for certain specific interests, such as commercial options. But as already noted, the 80 year period proved to be less popular in England than reliance on the longer perpetuity period available by using a royal lives clause. Therefore, England now prescribes a maximum time period of 125 years to more closely approximate the effect of a royal lives clause. This longer period is also meant to provide a measure of solace to advocates of perpetuities law abolition by at least providing a generous time limit before the codified RAP operates to make any outstanding contingent interest void. New Zealand proposes the longest maximum time period of 150 years, both to acknowledge increasing life expectancies in our modern age and also to allow existing trusts under the former perpetuities system to continue unimpeded until their natural end.

[128] Another option to consider is the Alberta Act's current mandating of 40 years as the fixed perpetuity period for the possibilities of reverter, resulting trust, right of re-entry or equivalent right in personal property (discussed more fully in Chapter 5).[146] Applied to all interests, however, it would represent a significant reduction in the concept of a perpetuity period.

[129] Regardless of the reform model chosen, any one of these time periods could be specified as the maximum time limit. The choice is not restricted to using the same time period specified by the jurisdiction in which each model originated. The main consideration is whether it is more beneficial for our society to enact a fixed perpetuity period that has a liberal time frame or one that is more restricted.

ISSUE 7

What should be the maximum time period for the operation of a redefined and simplified perpetuity period in Alberta?

(a) 40 years.

(b) 80 years.

(c) 125 years.

(d) 150 years.

(e) Other (please specify).

[146] Alberta Act, s 19.

CHAPTER 5

Perpetuities Reform for Non-Trust Equitable, Common Law and Commercial Interests

A. Introduction

[130] Over the centuries, case law extended RAP to areas well beyond the family trust and estates context. In addition to commercial trusts, the unreformed RAP also applies to future or contingent common law or equitable property interests in both private and commercial non-trust contexts. For example, it applies to future or conditional easements, options to purchase, rights of first refusal, rights of re-entry following a condition subsequent, and successive remainder interests.

[131] Not everyone views this historical extension of RAP as a logical or desirable development. Critics take the position that, without governmental or parliamentary intervention, the judge-made law simply grew and spread without any systematic regard to whether RAP's underlying policy was being served or not.[147] As stated by the Manitoba Law Reform Commission:[148]

> Once the rule is adopted by the courts, the very inductive growth of the common law through *stare decisis* ensures that a rule's existence becomes indelible. Attention is focussed on its operation and how property dispositions and transactions are to be affected by it. The conveyancer has no reason for considering why the rule should be, or should be as it is; his task is to know the rule so well that he can reduce to the smallest possible dimension its effects on his client's wishes. The judge also is rarely likely to be concerned with the policy behind such a rule as this; his task is to determine if, and how, it applies to the issue before him, given the precedents brought to his notice, and the emphasis on technique and logical deduction which, he finds, characterizes those precedents. Not until two hundred years after its commencement did any legislature become interested in its existence, and then the only concern was to remove some obvious excesses or contemporary inconveniences of a rule, which was by

[147] Manitoba Report at 27, 41.

[148] Manitoba Report at 22.

> then luxuriant in growth, complex to an extreme, and hallowed by time.

[132] In jurisdictions like Alberta which have statutorily reformed RAP, modifications are typically made to how RAP applies to non-trust equitable, common law and commercial interests. Sometimes, the Alberta Act exempts certain interests from RAP, such as an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, a right of first refusal or pre-emption as it applies to such an option, and an option to renew a lease.[149] The Act also exempts a gift over from one charity to another.[150]

[133] In other cases, the Alberta Act sets a fixed perpetuity period. Regarding commercial options generally, for example, the Act legislates a perpetuity period of 80 years and, without limiting this generality, notes that it will apply to all contracts concerning a future sale or lease, options in gross, rights of pre-emption or first refusal, and to future *profits a prendre*, easements and restrictive covenants.[151] When it comes to determinable interests in real or personal property and the possibility of reverter or resulting trust, the Act shortens the perpetuity period to 40 years. The Act further clarifies that (except for mineral leases) if the determinable event fails to happen within the perpetuity period, the determinable interest becomes absolute.[152]

[134] These non-trust equitable, common law and commercial interests raise special legal issues both if perpetuities law is abolished and if it is retained. Each scenario will now be considered in turn.

B. If Perpetuities Law is Abolished

[135] Even if one accepts that court variation of trusts legislation is a sufficient tool in the absence of perpetuities law to address any problematic perpetuity issues arising out of trusts and estates, it cannot be a complete answer. Such legislation would not apply to the non-trust equitable and common law dispositions now subject to perpetuities law.[153] As noted by the Law Reform

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[149] Alberta Act, s 17.

[150] Alberta Act, s 19(4).

[151] Alberta Act, s 18.

[152] Alberta Act, s 19(1)-(2), (5).

[153] Nor would modern taxation law be any check on such issues either, since the DDR provisions apply only to trusts.

Commission of Nova Scotia, the repeal of perpetuities law is advisable in this particular area only "[i]f a suitable means can be found to deal with cases of undue inconvenience or actual hardship arising from a long-term unvested property interest...."[154]

[136] Canadian jurisdictions which have abolished RAP have dealt with this issue in various ways.

1. MAKE VARIATION OF TRUSTS LEGISLATION APPLICABLE

[137] According to the Manitoba Law Reform Commission, if a court's ability to consent to the variation or termination of trusts under variation of trusts legislation is truly to perform the same balancing role as RAP, it must apply to everything to which RAP currently applies. The Commission outlined two methods to achieve this:[155]

(1) Statutorily provide that the variation of trusts legislation is applicable to all successions of limited interests whether they are equitable or common law in nature; or

(2) Abolish common law or legal successive interests by deeming them to be held on trust for the owners of the estate, i.e., convert all successive estates to equitable interests taking effect behind a trust and then the variation of trusts legislation will automatically govern them.

[138] The Manitoba Commission recommended the second method as the most conceptually consistent. Its final recommendation elaborates on the effect of this method:[156]

> 10. That common law successive estates be deemed to be held on trust for the owners of those estates. The trustees would be the adult and capacitated estate beneficiaries, and they would hold the legal or other title to the underlying property in trust for all vested and contingent beneficiaries, whether born, capacitated, ascertained, or otherwise.

[139] The Manitoba legislature implemented this recommendation.[157]

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[154] Nova Scotia Report at 28.

[155] Manitoba Report at 58.

[156] Manitoba Report at 59.

[157] *The Perpetuities and Accumulations Act*, CCSM, c P33, s 4.

[140] The second method, however, has a couple of problematic aspects. Its deemed equitable conversion of legal successive interests might carry broader implications and wider consequences than for perpetuities alone. Moreover, even within the area of perpetuities, the second method does not address equitable interests which exist outside a trust, such as an option to purchase. Such interests are not automatically subject to variation of trusts legislation nor would they be converted to trust interests by the second method's deeming provision since they are not common law or legal successive interests. Therefore, those interests would theoretically exist in perpetuity, with no way to terminate or modify them in the future if they cause problems.[158]

[141] The Law Reform Commission of Saskatchewan rejected Manitoba's choice of the second method. Instead, it advocated use of the first method of statutorily providing that variation of trusts legislation would be applicable to all successions of limited interests whether they are equitable or common law in nature. The Commission preferred this method essentially because of the nature of the Torrens System:[159]

> The so-called "legal doctrine of estates" that gives effect to future interests not created by trust is largely an historical anachronism. It does not fit well with the general concepts underlying the Land Titles system. It was probably for that reason that the Manitoba Law Reform Commission recommended abolition of the doctrine by converting legal future interests into trust interests. However, because legal future interests are virtually non-existent in practice in Saskatchewan, such interests may be encompassed by variation of trusts legislation in a simpler manner. Provision can be made for the unlikely possibility that a legal future interest will be created by will, contract, or other grant by extending the scope of variation of trusts legislation to permit variation of legal future interests. This result can be achieved by including legal future interests within the definition of "trust" for purposes of the legislation.

[142] However, when it comes to contingent future options to purchase, the Saskatchewan Commission did not recommend extending the variation of trusts legislation to deal with those particular interests because:[160]

> ... introduction of a discretionary element into the law relating to options would be commercially undesirable. It has been suggested ...

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[158] Part C of this chapter, below, also explores whether any retained perpetuities law should continue to apply to non-trust or commercial interests such as these.

[159] Saskatchewan Report at 26.

[160] Saskatchewan Report at 27.

> that options exercisable at some remote time in the future do not create unusual or insurmountable difficulties in any event. For that reason, it is unnecessary in the Commission's opinion for the law to incorporate any mechanism to control options.

[143] So, as in Manitoba, these interests should simply be allowed to endure in perpetuity. But, in the alternative, if some control were thought to be needed, the Saskatchewan Commission recommended enacting a simple default statutory limit on the duration of options, if the parties had not otherwise provided such a limit in their option agreement. Of course, having a special duration limit for these interests is, in reality, reintroduction of a special perpetuity rule for this class of interests, but the Commission did not dwell on this inconsistency with its main recommendation. The Commission was adamant that no form of RAP, in particular, should be retained as a way of handling such interests because that approach contradicts RAP's general repeal.[161]

[144] The Saskatchewan legislature, however, chose to adopt that rejected means of addressing those interests. The variation of trusts legislation did not redefine "trust" to include legal future interests and did not set a statutory limit on duration for options. Instead, it made consideration of the repealed law of RAP a prerequisite to a court exercising a discretionary power to vary or terminate one of those problematic interests:[162]

> **Authority of court to approve variations – re dispositions formerly subject to the rule against perpetuities**
> **51(1)** If a will, trust, settlement or other disposition creates an interest in property that might be void if the rules against perpetuities or the *Accumulations Act* were still part of the law of the Saskatchewan, the court, on the application of an interested party, may maintain, vary or terminate that interest on any terms that the court considers appropriate.

[145] The Law Reform Commission of Nova Scotia criticized the Saskatchewan legislation's broad wording in two regards. First, the provision grounds the court's jurisdiction in a hypothetical application of repealed law.[163] Second, it "leaves open the potential application of the court's virtually unlimited variation jurisdiction to interests created in the course of commercial bargaining."[164] The

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[161] Saskatchewan Report at 27.

[162] *The Trustee Act, 2009*, SS 2009, c T-23.01, s 51(1).

[163] Nova Scotia Report at 45.

[164] Nova Scotia Report at 42.

Commission considered that such judicial interference in parties' freedom to contract is inappropriate.

[146] A third criticism, of course, is that Saskatchewan lawyers will still need to learn and understand the legal intricacies of the common law RAP despite its general abolition.

2. ENACT SEPARATE VARIATION LEGISLATION

[147] The Law Reform Commission of Nova Scotia did not choose either of these two methods to handle any problems stemming from the absence of RAP in regard to long-term contingent non-trust property interests. It proposed a third solution, namely, enactment of a separate variation statute to address such interests.

[148] The Nova Scotia Commission recommended the creation of court jurisdiction to "order a variation (including advanced or postponed vesting, or termination) of any unvested property interest, other than one subject to the *Variation of Trusts Act*."[165] Its proposed model was accepted by the Nova Scotia government and implemented in the *Real Property Act*.[166] The court's new variation and termination powers apply to "every contingent interest in real property" arising before or after the effective date of the statutory provisions, except for those "held on a trust under any will, settlement or other disposition" or those prescribed by regulation as being excluded.[167] There are currently no regulations.

[149] Under section 31 of the Act, the court's power arises when the following test is met:

> 31 (4) Upon hearing the application and being satisfied that the reasonable use of the real property will be impeded, without practical benefit to others, if the interest is not varied or terminated, the court may make an order varying, including advancing or postponing the vesting of, or terminating the interest in the real property.
>
> (5) In making a determination pursuant to subsection (4), the court shall have regard to

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[165] Nova Scotia Report at 45.

[166] *Real Property Act*, RSNS 1989, c 385, ss 29-32.

[167] *Real Property Act*, RSNS 1989, c 385, s 30.

(a) the length of time that the interest has remained or could be expected to remain contingent;

(b) the intention, if ascertainable, of the grantor of the interest and, where the grantee was a *bona fide* purchaser for value, the grantee; and

(c) the position of any person appearing before the court on the application.

[150] The court may also order compensation "for any loss, injury, interference or damage suffered by any person arising from the variation or termination of the interest."[168] The Law Reform Commission of Nova Scotia expects such orders to be rare, "[g]iven the requirement that the order must not deprive any person of practical benefit of the interest."[169]

[151] These new court variation and termination powers are wide enough to apply to equitable interests which exist outside a trust, such as options to purchase. As noted above, the Nova Scotia Commission criticized Saskatchewan for allowing a court's virtually unlimited variation jurisdiction to be applied to interests created in the course of commercial bargaining. Yet Nova Scotia's legislation has the same potential.

3. CONSULTATION ISSUES

ISSUE 8

Given that current court variation of trusts legislation does not apply to **common law or legal** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?

(a) Statutorily provide that variation of trusts legislation applies to them.

(b) Statutorily abolish common law or legal property interests and convert them to equitable interests taking effect behind a trust so that variation of trusts legislation will apply to them.

(c) Enact a separate variation statute for them.

(d) Enact a statutory duration limit for them.

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[168] *Real Property Act*, RSNS 1989, c 385, s 31(6).

[169] Nova Scotia Report at 47.

(e) Do not make them subject to any variation statute or duration limit.

(f) Other (please specify).

ISSUE 9

Given that current court variation of trusts legislation does not apply to **non-trust equitable** property interests, how should any difficulties arising from such future or contingent interests be handled if perpetuities law is abolished?

(a) Statutorily provide that variation of trusts legislation applies to them.

(b) Enact a separate variation statute for them.

(c) Enact a statutory duration limit for them.

(d) Do not make them subject to any variation statute or duration limit.

(e) Other (please specify).

C. If Perpetuities Law is Retained

1. INTRODUCTION

[152] If perpetuities law is retained but reformed in any of the ways discussed in Chapter 4, there is still the larger issue of whether or to what extent perpetuities law should continue to apply to commercial or non-trust interests.

[153] Although the English and New Zealand reform models recommend very different approaches about how to retain a perpetuity period in the context of trusts and estates, both agree that perpetuities law should no longer apply to commercial or non-trust interests.

[154] Should Alberta consider this route of excluding any application of a perpetuity period to such interests? Should Alberta's perpetuity period (however framed) be restricted to non-commercial trusts and estates?

[155] In its 1971 recommendations, ALRI had no difficulty dismissing any such idea:[170]

[170] Alberta Report at 46.

> There has been much debate as to whether commercial transactions in general, and options in particular, are actually within the Rule. It is now settled [by case law] that they are. We appreciate the argument that the Rule should not apply to them at all, but on balance think that it should, provided the law is made clear and provided the time is a substantial one and provided lives in being are excluded.

ALRI then went on to suggest the 80-year perpetuity period for these interests which is now contained in section 18 of the Alberta Act.

[156] But have times and considerations changed?

2. SHOULD APPLICATION OF PERPETUITIES LAW BE RESTRICTED?

[157] The English Law Commission said that RAP should no longer apply to commercial dispositions for two reasons. First, the frequent absence of lives in being in such dispositions creates a short common law perpetuity period of only 21 years, which causes practical problems. In Alberta, however, this issue is addressed by the Alberta Act's creation of a statutory perpetuity period of 80 years for commercial dispositions.[171]

[158] Secondly, the English Commission is of the opinion that making commercial dispositions subject to RAP is an unnecessary and unwarranted interference in parties' freedom to contract.[172] To be precise:[173]

> The real reason for exempting commercial transactions (whatever they may be) from the rule against perpetuities is that they are outside the mischief which the rule seeks to contain. The need to control the dead hand "in order to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of the beneficiaries" simply does not arise in the commercial context.

[159] The Law Commission of New Zealand agreed with this opinion, noting:[174]

> The rule may be seen as an unwarranted interference in the ability of parties to contract, particularly as parties are often likely to have equal bargaining power. The restriction appears to serve little purpose in the commercial context.

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[171] Alberta Act, s 18.

[172] England Report at paras 7.17-7.18.

[173] England Report at para 7.42, quoting Ruth Deech, "Lives in Being Revisited" (1981) 97 LQR 593 at 594.

[174] New Zealand Issues Paper at para 2.50.

[160] However, if there is a generously long perpetuity period like 125 or 150 years, is it really a hardship for commercial interests to comply with it? Rather than trying to delineate the scope of perpetuities law, the simplicity that comes with uniformity of application may be easier to manage.

[161] On the other hand, since no perpetuities law exists in Manitoba, Saskatchewan and Nova Scotia, is there or could there be a danger that business not connected to real property might move to those jurisdictions rather than comply with Alberta law? Abolition has already existed for long enough in those provinces that if such a trend were going to develop on a large scale, it would likely have been noticeable by now and action demanded to remedy it. This does not seem to have occurred. But if more provinces follow the ULCC's recommendation to abolish perpetuities law, could that situation develop?

[162] In formulating its recommendation, the English Law Commission ran into conceptual difficulties about how to effectively express the exclusion of RAP's application to commercial dispositions. It specifically rejected the Alberta Act's approach (used in section 18) of identifying such dispositions as those involving "a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time." The English Commission stated:[175]

> Our concern is that definitions of this kind would be too limited for the purposes that we intend, because we can foresee commercial arrangements that might not fall within them, such as the immediate grant of a future right over land.

[163] The English solution to this difficulty is to completely codify RAP and then statutorily:[176]

> ... adopt an *inclusionary* rather than an *exclusionary* approach. In other words, we decided to define those interests to which the rule should apply rather than those to which it should not. The only cases in which the need for dead hand control appeared to us to require the application of the rule against perpetuities was in relation to future estates and interests arising under trusts or wills. This approach restores the application of the rule to the very situations for which it was created....
>
> The effect of these proposals will be to make the rule inapplicable to rights such as future easements, options in gross, rights of pre-emption and most commercial transactions. We are aware that, as a

[175] England Report at para 7.50.

[176] England Report at paras 7.21-7.22 [emphasis in original]. See also paras 7.30-7.31.

result, there may be risks in relation to the creation of open-ended options and future easements. However, we consider that these risks are best evaluated by the parties to the transactions, who will commonly be acting upon legal advice.

[164] In implementing this approach, the England Act carefully restricts RAP to specified types of estates, interests and rights arising under trusts or wills.[177] As noted, this approach also serves to exclude RAP's application to all future easements, future restrictive covenants, options and rights of pre-emption.[178]

[165] If New Zealand adopts its Law Commission's proposed restriction, implementation will perhaps be easier because that jurisdiction has an existing statute which restates and partially codifies the law of real and personal property.[179] In regard to common law rules respecting property, section 59(1) of the *Property Law Act 2007* provides that "[e]states and interests in property may be created that take effect at a future time." Reform would simply involve repealing section 59(2) which states "[s]ubsection (1) applies subject to the rule against perpetuities and the Perpetuities Act 1964."[180]

3. CONSULTATION ISSUE

ISSUE 10

Is there any valid social or legal policy purpose to apply perpetuities law to commercial or non-trust interests?

(a) No.

(b) Yes (please specify).

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[177] England Report at para 7.42; England Act, s 1. Exceptions are contained in s 2 for charities and pension schemes. Further exceptions may be specified by regulation under s 3.

[178] England Report at paras 7.7, 7.8, 7.10, 7.15, 7.35.

[179] New Zealand Report at paras 17.13-17.14.

[180] *Property Law Act 2007* (NZ), 2007/91, s 59(1)-(2).

CHAPTER 6

Transitional Issues

A. Introduction

[166] Depending on whether a jurisdiction completely abolishes perpetuities law or retains but reforms it, different transitional strategies are typically used. When perpetuities law is abolished, application of that abolition is generally retrospective, with certain exceptions. When perpetuities law is retained but reformed, application of that reform is generally prospective, with certain exceptions.

B. Abolition: Retrospective Application with Exceptions

[167] In jurisdictions like Manitoba, Saskatchewan and Nova Scotia in which the unreformed common law RAP existed, it seemed relatively straightforward to give the total abolition of perpetuities law a retrospective application, sweeping away the old law almost in its entirety. Exceptions to retrospective application were commonly made only where (1) an interest had previously been held by a court to be void for violating RAP, or (2) the vesting period had already terminated and there had been active reliance on that termination (for example, by transferring property). In other words, situations that were legally completed could not be reopened but apart from that, existing interests would no longer be subject to any challenge based on RAP.[181] As the Manitoba Law Reform Commission said regarding its proposed Act implementing abolition:[182]

> ... given the clear policy of the Act, it is preferable to have a clean break with the old law, rather than allow the old law to linger on into an indefinite future, subject only to the limitation of actions, and with respect only to some instruments, namely those taking effect before the Act comes into force. Given the policy of the Act, we can see no compelling justification for leaving "skeletons in the cupboard", wills and deeds in strong rooms and desks that in years to come are

[181] See, for example: Manitoba Report at 84-88; *The Perpetuities and Accumulations Act*, CCSM, c P33, s 5; Saskatchewan Report at 27-28; *The Trustee Act 2009*, SS 2009 c T-23.01, s 60; Nova Scotia Report at 49-51; *Perpetuities Act*, SNS 2011 c 42, s 4. Slight differences in the exceptions to retrospectivity exist among these jurisdictions, but nothing that contradicts their basic common approach.

[182] Manitoba Report at 87.

> recognized as having provisions which are in violation of the perpetuity or accumulation rules, with all that may flow therefrom.

C. Retention and Reform: Prospective Application with Exceptions

[168] In jurisdictions which chose not to abolish perpetuities law but simply reformed it, prospective application of such reform was, and remains, the standard transitional scheme. As ALRI noted in its 1971 Report:[183]

> One might be tempted to provide that a Statute of this kind should operate retrospectively, since its purpose is to remove unfairness from the common law. However we think difficulties could arise if the Act were to be made to apply to dispositions already made.

Therefore, ALRI recommended adoption of the English and Ontario approach of allowing only prospective application of reformed RAP legislation.

[169] Currently, therefore, Alberta has a two-tiered perpetuities regime: (1) the common law RAP which governs future and contingent property interests under instruments which "took effect" prior to the July 1, 1973 commencement date of the Alberta Act, and (2) the reformed RAP of the Alberta Act which governs those interests in instruments "taking effect" after that date.[184] The Act does not define the concept of "took/taking effect" but presumably the common legal understanding would apply. For example, a will is created on the date it is signed but it does not take effect until the testator dies.

[170] In jurisdictions like England and New Zealand where reform of the reformed RAP has been enacted or proposed, prospective application of such reform remains the basic transitional model, although each does allow some limited retrospective application as well. New Zealand allows the most scope for retrospectivity, since its more radical reform actually replaces RAP with a statutory duration period.

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[183] Alberta Report at 77.

[184] Alberta Act, s 25. Minor exceptions to prospective application are made so that the reformed RAP would apply retrospectively to the exercise of trustees' administrative powers under instruments pre-dating the reforms, to preserve the Act's inapplicability to employee benefit trusts, and to preserve the already-enacted retrospective application of the Act's previous abolition of the *Accumulations Act*.

[171] The English Law Commission rejected retrospective application, particularly in regard to the new exclusion from RAP of non-trust and commercial dispositions:[185]

> To abrogate the applicability of the rule to certain types of right and interest might have the effect of validating dispositions that had been treated either as void *ab initio* or as spent through the effluxion of the perpetuity period. It would also almost certainly interfere with commercial bargains that had been concluded on the basis of the present law. The only justification for retrospective reform would be to make the law simpler and to obviate the need to know the former law. We are not satisfied that any viable scheme having retrospective effect would meet those goals, because of the need to preserve the effect of concluded or void transactions.

[172] The Commission also recommended prospective application of the new 125 year vesting period so that it will apply only to instruments taking effect on or after the commencement date of the new reform legislation. As the Commission noted:[186]

> The dangers of retrospective application are less acute in relation to the length of the perpetuity period than they are as regards the applicability of the rule. However, there is a risk that if the new period were to apply to existing trusts it could defeat the intentions of settlors and testators and affect the rights of beneficiaries. Many existing trusts are likely to contain provisions that are incompatible with the new regime.

[173] However, the Commission also proposed two exceptions to prospective application. First, the new law should not apply to wills executed before the commencement date but which come into effect afterwards because "[m]any testators will have executed wills on the basis of the law as it stood before the legislation was brought into force." Such wills should be subject to the previous perpetuities law. This exception was implemented by the government.[187]

[174] Secondly, where royal lives clauses are involved, the English Law Commission recommended possible retrospective application of the new 125 year period to trusts already in effect at the commencement date of the reform. If the end of such a trust's perpetuity period cannot be determined because it is difficult or impracticable for trustees to ascertain the existence or whereabouts of

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[185] England Report at para 7.53.

[186] England Report at para 8.18.

[187] England Act, s 15(1)(a).

the trust's measuring lives, the trustees may choose to "opt in" to the Act's new fixed perpetuity period in order to alleviate the uncertainty.[188] This exception, therefore, is really a kind of saving provision. The government implemented this recommendation but specified for these opt-in cases a special fixed perpetuity period of 100 years only.[189]

[175] The New Zealand Law Commission said it wants to avoid complex transitional provisions for existing trusts. The new 150 year maximum duration rule will, of course, apply prospectively to trusts established after the rule comes into effect. The Commission says it also should apply to trusts already in existence at that date – but not automatically. Existing trusts will be continue to be bound, first and foremost, by any specific provisions in their trust deeds.[190]

[176] If an existing or new trust includes a mechanism to calculate the vesting date rather than specifying a duration, the trust will continue until the earlier of (a) the date resulting from that calculation or (b) 150 years from the establishment of the trust.[191]

[177] If the distribution date in an existing trust is fixed, this date will continue to govern. If trustees want to extend it, they can seek variation by the terms (if any) of the trust deed, by agreement of the beneficiaries or by court order.[192]

[178] The Commission did not recommend automatic, blanket retrospective application for the new duration limit because:[193]

> ... in this area, it is important to take account of the intention of the settlor and beneficiaries' interests. It is difficult to say in any particular instance that a settlor would have opted for a 150 year period. Extending the period would risk going beyond what the settlor intended. Once settled, trusts are only changed by agreement between the beneficiaries, by a court order or as provided for in the terms of the trust. Importantly, changing the vesting date not only changes the date by which all assets must vest, but would likely change the identity of the beneficiaries in whom the assets ultimately

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[188] England Report at paras 8.19–8.20.

[189] England Act, s 12. This opt-in scheme is also available to trusts in wills executed before the commencement date of the reform but which come into effect afterwards. It does not apply, however, to any trust whose terms were exhausted before the commencement day. See s 15(2)-(3).

[190] New Zealand Report at para 17.26.

[191] New Zealand Report at para 17.28.

[192] New Zealand Report at para 17.29.

[193] New Zealand Report at para 17.27.

> vest. Our view is that it is not appropriate to be able to easily alter the period because this will also alter these beneficial interests.

[179] As previously noted, the New Zealand Law Commission's recommendations have not to date been implemented and are under review by a special panel of experts who will further advise the government.

D. Consultation Issues

[180] The various law reform options discussed in this report each have their own set of transitional issues to consider, of which a brief recap follows. Readers are requested to give their consultation input on those issues which correspond to the model of reform which they support.

[181] If perpetuities law is abolished, should that abolition be generally applied retrospectively to instruments already in effect at the date of abolition? An exception might be made for any interest previously held by a court to be void for violating RAP. Another exception might be where the vesting period has already terminated and there has been active reliance on that termination.

[182] If perpetuities law is retained but reformed by codifying RAP and legislating a fixed perpetuity period for vesting, a standard prospective application of these changes would be best. One exception, however, might be that the new law should not apply to wills executed before the commencement date of the reform but which will come into effect after the commencement date. A special exception might also be warranted for trusts already in effect but which have an unclear vesting date so that trustees could "opt in" to the reform provisions in order to alleviate that uncertainty.

[183] If the New Zealand model is favoured which replaces RAP with a fixed duration period for trusts, the main transitional issue is whether it should be generally applied retrospectively to trusts already in effect at the date of RAP's replacement. An exception might be made if the trust deed specifies a fixed distribution date. Another exception might be warranted if the trust deed includes a specific mechanism to calculate a vesting date. In such a case, it is arguable that the trust deed's provisions should govern but only until the earlier of the date resulting from that calculation or the fixed duration limit as provided by the reform legislation.

ISSUE 11

How should transitional issues be handled?

Deadline for comments on the issues raised in this document is June 30, 2016

Please complete the online survey at
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